87-1701

Supreme Court, U.S.
FILED
APR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

RICHARD L. DUGGER,

Petitioner,

v.

CHARLES KENNETH FOSTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

HAS THE FLORIDA SUPREME COURT MISINTERPRETED AND TAKEN AN OVERLY EXPANSIVE VIEW OF THIS COURT'S DECISION IN **HITCHCOCK V. DUGGER**, _____ U.S. _____, 95 L.Ed.2d 347 (1987)?

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NO. _____

IN THE
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October Term, 1987

RICHARD L. DUGGER,

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v.

CHARLES KENNETH FOSTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner, Richard L. Dugger, respectfully prays for entry of a writ of certiorari to review the judgment of the Supreme Court of Florida entered in **Foster v. Dugger**, Case No. 70,597 (Fla. 1987).

OPINIONS BELOW

The opinion of the Florida Supreme Court appears at **Foster v. Dugger,** 518 So.2d 901 (Fla. 1987), **rehearing denied** February 10, 1988.

The decision in Foster's original appeal appears in **Foster v. State,** 369 So.2d 928 (Fla. 1979), **cert. denied,** 444 U.S. 885 (1979). Foster petitioned for collateral relief without success. **Foster v. State,** 400 So.2d 1 (Fla. 1981) and twice sought federal habeas corpus relief. **Foster v. Strickland,** 707 F.2d 1339 (11th Cir. 1983), **cert. denied,** 466 U.S. 993 (1984) and **Foster v. Dugger,** 823 F.2d 402 (11th Cir. 1987), **cert. pending.**

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The action arises out of a decision of the

Florida Supreme Court for which rehearing was denied on February 10, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, **inter alia** that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Charles Kenneth Foster murdered one Julian Lanier by slitting his throat, burying him under some branches and then returning to sever the victim's spine. The details of the killing itself are not germane to this action and are summarized in **Foster v. State,** 369 So.2d 928 (Fla. 1979).

As noted above, Foster sought federal habeas corpus relief twice, contending that his trial attorney was incompetent for failing to investigate and present statutory and non-statutory mitigating evidence. Relief was repeatedly denied due to the fact that Foster did not permit counsel to prepare or present this evidence and, in fact, Foster asked for the death penalty in open court.

Following this Court's decision in **Hitchcock v. Dugger,** 481 U.S. _____, 95

L.Ed.2d 347 (1987), Foster petitioned for habeas corpus relief in the Florida Supreme Court. Foster changed his line of attack from "failure to prepare or present" mitigating evidence (by counsel) to the trial court's "failure to consider" that same, unproffered, "evidence". Foster did not claim that this "evidence" was offered for the sentencer to consider, because it was not. Foster did not claim that trial counsel "failed" to present the evidence because he felt restricted by the statute (**a la Hitchcock**), since Foster himself refused to let counsel prepare or present non-statutory mitigating evidence. Foster did not object to the trial judge's instructions, nor did he contest them on direct appeal.

At the time Foster decided to raise a **Hitchcock** claim, the issue seemed to be procedurally barred under **Copeland v.**

Wainwright, 505 So.2d 425 (Fla. 1987). Thus, the state sought dismissal of Foster's successive petition on procedural grounds. Oral argument on the state's motion was scheduled for October 7, 1987.

On October 6, 1987, the state received notice of this Court's granting of certiorari and summary remand of **Copeland.** On October 7, 1987, at oral argument, we advised the justices of the Florida Supreme Court of the action in **Copeland** and the impact of said decision upon our procedural arguments.

When the Florida Supreme Court ruled in this case, it did not consider "harmless error", despite a mandatory, statutory obligation to do so under §924.33, Fla.Stat. because it felt that **Hitchcock** "mandated" resentencing and because the

state had not briefed "harmless error".[1] This decision stood in stark contrast with **Morgan v. State,** _____ So.2d _____ (Fla. 1987), 12 F.L.W. 433; wherein the Florida Supreme Court, **sua sponte,** "raised" a **Hitchcock** claim **for** a defendant and granted him relief even though he, like the state in this case, had not "briefed" the issue. (Certiorari is pending in **Morgan**).

The so-called non-statutory mitigating evidence which the Florida Supreme Court cited in support of its decision was evidence which, in Foster's prior collateral attacks, was not presented because of Foster's instructions to counsel not to prepare or present same. Due to its

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[1] The state had not yet filed an answer only because its motion to dismiss was pending. A state request for leave to file an answer addressing "harmless error" was denied.

reading of **Hitchcock**, the Florida Supreme Court did not review this evidence or the reasons for its "non-consideration".

REASONS FOR GRANTING THE WRIT

THE FLORIDA SUPREME COURT HAS MISINTERPRETED AND TAKEN AN OVERLY EXPANSIVE VIEW OF THIS COURT'S DECISION IN **HITCHCOCK V. DUGGER,** _____ U.S. _____, 95 L.Ed2d 347 (1987).

The Florida Supreme Court has expanded the **Hitchcock** decision to include cases where non-statutory mitigating evidence is not considered at the request of the defendant himself. The court's decision relies solely upon talismanic jury instructions and a **post hoc** proffer, a decade after trial, of evidence which "could have been considered". We suggest that this decision constitutes a bizarre and extreme overexpansion of **Hitchcock** which requires correction by this Honorable Court.

The issue at bar is analogous to several other situations wherein this Court has granted certiorari. In **Spaziano v.**

Florida, 468 U.S. _____, 82 L.Ed.2d 340 (1984), this Court granted certiorari to review a defendant's waiver of lesser included offense instructions in a capital case where such instructions were ordinarily required. Here, by comparison, the defendant waived the preparation and presentation of non-statutory mitigating evidence and told the jury he deserved the death penalty. Yet now he claims the court "failed to consider" this same evidence. Foster prevailed without having to explain how the sentencer or the advisory jury could have "considered" this evidence which, for ten years, Foster has been telling us was never prepared nor presented (by counsel) on his behalf.

In **Oregon v. Mathiason**, 429 U.S. 492 (1977), certiorari was granted when the Oregon courts unduly expanded this Court's decision in **Miranda v. Arizona**, 384 U.S.

436 (1966) to cover a non-custodial, voluntary confession. The over expansion of **Miranda** to benefit a defendant who caused his own confession to be taken presented a situation which required intervention. The same holds true in this case.

Foster wanted to "walk or burn". Foster did not allow his attorney to prepare or present the mitigating evidence he now blithely condemns the trial court for "not considering". For the past decade we have contended with Foster's successive and abusive "ineffective assistance of counsel" petitions all complaining about non-statutory mitigating evidence that, at Foster's direction, was never prepared or presented. Now, without blinking, in reliance upon **Hitchcock**, Foster has requested and received resentencing because this evidence was not "considered". Why?

Apparently because the Florida Supreme Court failed to interpret **Hitchcock** in the manner intended by this Court.[2] Once the Florida Court saw the talismanic jury instruction, it granted relief without regard to the facts.

The decision in **Hitchcock** has profoundly impacted capital litigation in Florida. The Florida Supreme Court has

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[2] We note that the Florida Supreme Court's opinion cites to two kinds of mitigating evidence which was allegedly not considered. One was Foster's mental deficiency, possibly exacerbated by drugs. The other was Foster's "remorse". While "remorse" was never raised as a mitigating factor during the penalty phase, Foster's mental health was mentioned by witnesses called "in defiance" of Foster's instructions. Mental capacity, including the impact of drugs, is a **statutory** mitigating factor, not a "non-statutory" factor. As such, it was misidentified by the Florida Supreme Court. The trial court and the Florida Supreme Court, on direct appeal, weighed and reviewed all statutory mitigating evidence, if not all the "evidence".

considered **Hitchcock** error both fundamental and harmless, "waived" and immune from procedural bars. The confusion stems from unresolved questions regarding the status of **Hitchcock** as either "new law" or merely an evolutionary extension of **Lockett v. Ohio,** 438 U.S. 586 (1978), and the applicability of procedural default, waiver and harmless error upon so-called "Hitchcock" error. The importance of this issue to the administration of capital justice in Florida supports a grant of certiorari. See **Oregon v. Kennedy,** 456 U.S. 667 (1982); **Rhodes v. Chapman,** 452 U.S. 337 (1981); **Davis v. Alaska,** 415 U.S. 308 (1974) and **Bullington v. Missouri,** 451 U.S. 430 (1981).

Charles Kenneth Foster is simply not entitled to pervert justice, **Curry v. Wilson,** 405 F.2d 110 (9th Cir. 1968) by refusing to argue or offer "non-statutory"

mitigating evidence and then, on the coattails of **Hitchcock**, win resentencing years later because the unproffered evidence was not "considered". This, however, is the result of the Florida Supreme Court's over extension of this Court's limited decision in **Hitchcock**. We urge this Court to grant review.

CONCLUSION

Certiorari should be granted due to the Florida Supreme Court's expansion of the decision in **Hitchcock v. Dugger** beyond the scope of the Court's decision.

Respectfully submitted,

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COUNSEL FOR PETITIONER

APPENDIX

SUPREME COURT OF FLORIDA

WEDNESDAY, FEBRUARY 10, 1988

CHARLES KENNETH FOSTER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 70,184

Circuit Court Case No. 75-486 (Bay County)

CHARLES KENNETH FOSTER,

Petitioner,

vs.

RICHARD L. DUGGER, etc.,

Respondent.

CASE NO. 70,597

On consideration of the motion for rehearing and for leave to file supplemental briefs filed by attorney for respondent, reply thereto and objection to reply,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

The motion for stay of mandate filed by attorney for respondent is granted and the proceedings in this Court and the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, are hereby stayed to and including April 11, 1988, to allow respondent to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy C
TEST
Sid J. White
Clerk Supreme Court

cc: Hon. Harol Bazzel, Clerk
Hon. Don T. Sirmons, Judge
Mark C. Menser, Esquire
Richard H. Burr, III, Esquire
Steven L. Seliger, Esquire
Capitol Collateral Representative

SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER, Appellant,

vs. No. 70,184

STATE OF FLORIDA, Appellee.

CHARLES KENNETH FOSTER, Petitioner,

vs. No. 70,597

RICHARD L. DUGGER, etc., Respondent.

[December 3, 1987]

PER CURIAM.

Charles Kenneth Foster appeals the denial of a motion for postconviction relief filed pursuant to rule 3.850, Florida Rules of Criminal Procedure, and also petitions this Court for a writ of habeas corpus in connection with the death sentence imposed upon him. We have jurisdiction. Art. V, §§ 3(b)(1), (9), Fla. Const.

The facts pertinent to our discussion are simple. Foster was convicted of murder and sentenced to death in 1975.[1] During the sentencing phase, the prosecutor told the jury that under Florida's capital punishment system their recommendation as to the death penalty or life imprisonment would not be determinative, as the final decision rested with the trial court. As was the procedure in effect at that time, there was no jury instruction on non-statutory mitigating factors. Defense counsel did not object to either the prosecutor's statements or to the instructions. The jury recommended the death penalty, and the trial judge imposed a sentence of death.

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[1] The judgment and sentence were affirmed in Foster v. State, 369 So.2d 928 (Fla.), cert. denied, 444 U.S. 885 (1979).

In his appeal from the denial of his motion for postconviction relief, Foster contends that the conduct of the trial violated **Caldwell v. Mississippi**, 472 U.S. 320 (1985), in that the jury was told that its role was only to give an advisory opinion, thereby diminishing its sense of responsibility. If there was any validity to this claim, it should have been raised on appeal because **Caldwell** did not represent a change in the law upon which to justify a collateral attack. **Witt v. State**, 387 So.2d 922 (Fla.), **cert. denied**, 449 U.S. 1067 (1980). Moreover, Foster's claim could not be sustained on its merits because unlike **Caldwell**, in Florida the judge rather than the jury is the ultimate sentencing authority.

In his petition for habeas corpus, Foster claims that his sentencing proceeding violated the principles of

Lockett v. Ohio, 438 U.S. 586 (1978), and **Hitchcock v. Dugger**, 107 S.Ct. 1821 (1987), in that the jury and judge did not consider nonstatutory mitigating evidence in deciding his sentence. The record reflects not only the jury instruction condemned in **Hitchcock** but also the fact that the trial judge felt himself limited to considering the statutory mitigating factors. The sentencing order stated: "The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in subsection (5) of section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, **as enumerated in Subsection (6) of said Section 921.141,** to outweigh the aggravating circumstances." (Emphasis added.)

The fact that the judge, the ultimate sentencing authority did not consider non-statutory mitigating evidence settles the issue because there was some nonstatutory mitigating evidence that the court could have considered.[2] **Hitchcock; Delap v. Dugger,** No. 71,194 (Fla. Oct. 8, 1987); **Harvard v. State,** 486 So.2d 537 (Fla. 1986). A new sentencing proceeding is mandated "when it is apparent from the record that the sentencing judge believed that consideration was limited to the

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[2] Foster asserts as non-statutory mitigating factors his long history of mental illness and treatment, his intoxication at the time of the murder, and his remorse for the commission of the crime.

mitigating circumstances set out in the capital sentencing statute...." Id. at 539.[3]

We affirm the appeal of the denial of the motion for postconviction relief. However, we grant the petition for habeas corpus, vacate Foster's sentence and remand this case to the trial court for a new sentencing proceeding at which all mitigating evidence may be presented to the judge and jury.

It is so ordered.

McDONALD, C.J., and OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., Concur

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[3] Hitchcock left open the possibility of harmless error, an issue the state did not brief in this case. The main thrust of the state's argument here is that the Lockett issue is procedurally barred. This Court has settled that question adversely to the state in Riley v. Wainwright, No. 69,593 (Fla. Sept. 3, 1987).

BARKETT, J., Concurs specially with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

BARKETT, J., specially concurring.

I agree with the court's opinion except for its **Caldwell** analysis and conclusion. In **Adams v. Wainwright,** 804 F.2d 1526 (11th Cir. 1986), **modified,** 816 F.2d 1493 (11th Cir. 1987), the Eleventh Circuit has interpreted **Caldwell v. Mississippi,** 472 U.S. 320 (1985), as applicable to Florida's capital sentencing scheme. **See also Mann v. Dugger,** 817 F.2d 1471 (11th Cir., **vacated & set for rehearing,** 828 F.2d 1498 (11th Cir. 1987); **Harich v. Wainwright,** 813 F.2d 1082 (11th Cir.), **vacated & set for rehearing,** 828 F.2d 1497 (11th Cir. 1987). I believe this is correct and cannot join the majority's conclusion to the contrary.

In **Adams,** the Eleventh Circuit specifically concluded that **Caldwell** constituted a fundamental change in the law, thus permitting petitioners to raise

the issue for the first time on collateral challenge. **Adams**, 816 F.2d at 1495. **Accord McCorquodale v. Kemp**, 829 F.2d 1035 (11th Cir. 1987). Although we are not bound by this conclusion, **Witt v. State**, 387 So.2d 922 (Fla.), **cert. denied**, 449 U.S. 1067 (1980), it nevertheless is both persuasive and manifestly correct. In **McCorquodale**, the Eleventh Circuit reiterated its prior comments:

> [T]he state of the case law prior to **Caldwell**, gave no indication that such statements might violate the eighth amendment....**Caldwell** was the first Supreme Court case to hold that prosecutorial statements regarding appellate review might violate the eighth amendment....We conclude that **Caldwell** represented new law; thus a **Caldwell** violation, if proven, would present new grounds for relief.

Id. at 1-36-37. In effect, the majority upholds the application of a procedural bar although petitioner's trial preceded the

decision in **Caldwell.** This merely leaves this issue for the federal courts to resolve.

Nor can I agree with this Court's prior statements that an independent remedy existed under Florida law for the type of claim asserted in this instance. **See Copeland v. Wainwright,** 505 So.2d 425 **vacated,** 108 S.Ct. 55 (1987). This position cannot be squared with federal law. In **Ake v. Oklahoma,** 470 U.S. 68, 75 (1985), the Supreme Court held that

> when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded . . . .In such a case, the federal law-holding is integral to the state court's disposition of the matter....

The mere fact a petitioner could have interposed an objection based on state-law

grounds, **e.g. Copeland; Ailer v. State,** 114 So.2d 348 (Fla. 1959); **Pait v. State,** 112 So.2d 380 (Fla. 1959), does not change the fact that **Caldwell**--unlike these state decisions--rested on the eighth amendment. Under **Ake,** the eighth amendment principle espoused in **Caldwell** cannot be barred merely because petitioner failed to raise an objection grounded in state law that happened to address a similar concern.

Finally, it is misleading, though technically true, to say that the trial judge is "the ultimate sentencing authority." Majority opinion at 2. The judge does impose sentence. However, the jury's role is crucial and usually decisive, since it is binding upon the trial judge unless virtually no reasonable person could have reached that result. **E.g., Fead v. State,** 512 So.2d 176 (Fla. 1987); **Ferry v. State,** 507 So.2d 1373 (Fla.

1987); **Tedder v. State**, 322 So.2d 908 (Fla. 1975). Even in **Copeland**, we acknowledged "[t]he extreme importance of the jury's sentencing recommendation." 505 So.2d at 427. Indeed, the trial judge **must** follow the jury's advice in the majority of cases. **See** Mello & Robson, **Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases**, 13 Fla. St. U.L. Rev. 31, 53-54 (1985) (three quarters all jury overrides are reversed on appeal). Because of the extreme importance of the jury recommendation, I therefore conclude that the jury and judge **acting together** constitute the sentencer in Florida. **Caldwell** thus is binding upon both.

For these reasons, the trial court should have heard this petitioner's **Caldwell** claim on the merits rather than dismissing it as procedurally barred.

Moreover, because this issue continues to arise in cases like this one, I conclude that the standard jury instruction for the penalty phase should be revised to reflect more accurately the extreme importance of the jury's role.

An Appeal from the Circuit Court in and for Bay County,

Don T. Sirmons, Judge-Case No. 75-486

and An Original Proceeding-Habeas Corpus

Richard H. Burr, III, New York, New York; and Steven L. Seliger, Quincy, Florida,

for Appellant/Petitioner

Robert A. Butterworth, Attorney General and Mark C. Menser, Assistant Attorney General, Tallahassee, Florida,

for Appellee/Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3539

CHARLES KENNETH FOSTER,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, and
ROBERT A. BUTTERWORTH, Attorney General,

Respondents-Appellees.

Appeal from the United States District Court For the Northern District of Florida

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(July 16, 1987)

Before GODBOLD, VANCE and JOHNSON, Circuit Judges

VANCE, Circuit Judge:

Charles Kenneth Foster was sentenced to death after he confessed during the guilt/innocence phase of his first-degree murder trial. This is an appeal from the district court's denial of his second and successive petition for a writ of habeas corpus. Like its predecessor, Foster's second petition seeks relief based upon the performance of his attorney, Virgil Mayo. Foster again argues that judge and jury did not have the opportunity to review crucial evidence. We affirm.

I. BACKGROUND

Foster met Julian Lanier at a bar on the evening of July 14, 1975. The two men persuaded two prostitutes to travel in Lanier's motorhome to a remote wooded area. Both men grew increasingly intoxicated. In the early morning of July 15, as Lanier and one of the women were about to

engage in sexual intercourse, Foster attacked him and slit his throat with a knife. Aided by the women, Foster dragged Lanier into the woods and covered him with leaves and branches. Lanier, however, was still breathing. With one slice, Foster severed his spinal cord. Foster and the two women then divided the money in Lanier's wallet.

The trial began on October 1, 1975. Foster's case rested entirely on his own testimony. Foster was planning to suggest that one of the women committed the homicide. In the middle of this testimony, however, Foster broke down and made a dramatic witness stand confession consistent with his earlier confession to the police. Following this confession, the jury convicted Foster of murder in the first degree and robbery. The sentencing phase commenced immediately thereafter.[1]

During the penalty phase, Mayo pursued a strategy Foster had earlier rejected: to defend on the basis of Foster's mental and emotional state at the time of the crime. The mitigating evidence Mayo presented to the jury consisted of the testimony of two witnesses and documents pertaining to Foster's two involuntary commitment proceedings.[2]

First, Foster's ex-wife described the "abnormalities in [Foster's] behavior:"

> Well, he cut himself all the time and he has cut all the arteries in his arms and he has cut the heel strain in two and he has burnt steel wool in his leg. Just all kinds of things. The only reasons he doesn't kill his-self [sic] is because he thinks that that is the one crime that he cannot be forgiven for.

Mrs. Foster concluded with an impassioned plea not to kill her ex-husband because he was "a very sick person."

Dr. John Mason, a psychiatrist who had treated Foster, testified next. The doctor's testimony was limited to his assessment of the possible effect of alcohol on Foster's capacity for premeditation:

> Certainly, I would feel that from past experience Mr. Foster has very poor control when intoxicated and certainly intoxication would effect [sic] his ability to maintain a thought or to maintain a plan or carry it through. But as to estimate exactly how long he would be able to do so I don't think I could really do that.

Dr. Mason also identified the documents from the involuntary commitment proceedings and read his diagnosis on each occasion: "paranoid reaction" on November 25, 1970, and "suicidal depression with overdose of medication and self mutilative [sic] behavior" on February 21, 1974.[3]

At the conclusion of the sentencing hearing, the judge, but not the jury, considered reports from Dr. Mason and two other court-appointed psychiatrists.[4] These reports alluded to a long and stormy history of mental illness. All three psychiatrists concluded, however, that Foster was competent to stand trial and legally sane at the time of the crime. In accordance with the jury's recommendation, the judge sentenced Foster to death on the murder charge and life imprisonment on the robbery charge.[5]

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In his first petition for federal habeas corpus, Foster claimed that the jury did not have the opportunity to learn the full impact of his mental illness. Foster specifically argued that his attorney failed to extract important clinical information from his expert witness, Dr.

Mason. **See Foster v. Strickland,** 707 F.2d 1339, 1344 (11th Cir. 1983), **cert. denied,** 466 U.S. 993 (1984).[6] In fact, counsel had made a strategic decision informed by years of criminal practice in the region. Counsel felt that the jury would be more likely to respond to an emotional appeal from Mrs. Foster than to a medical discourse from Dr. Mason. We concluded that counsel had adequately mustered the medical evidence to effectuate this strategy. **Id.** Mayo elicited from Dr. Mason enough clinical information to lend credibility to Mrs. Foster's plea that her husband was "a very sick person." May also used Dr. Mason to introduce documentary proof of Foster's history of mental illness. **Id.** This tactic gave the jury a written exhibit so they did not have to remember techical oral testimony. **Foster v. State,** 400 so.2d 1, 4 (Fla. 1981). It

is difficult to see how counsel could have better utilized an expert witness who, along with two other psychiatrists, had already gone on record with his conclusion that the defendant was sane at the time of the homicide.

The present petition is Foster's second before the federal courts. The magistrate found and the district court specifically agreed, however, that Foster's petition was not an abuse of the writ. **See** Rule 9(b), 28 U.S.C. foll. §2254. This finding is not challenged on appeal, and we shall not address the issue.

In the present petition Foster repeats his attack on counsel's decision to forego a detailed presentation of medical evidence and to rely instead upon Mrs. Foster's emotional plea. Although we accord such strategic decisions a heavy measure of deference, the Supreme Court has suggested an exception:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, 466 U.S. 688, 690-91 (1984).[7] Foster now seizes upon this exception.

For purposes of this appeal, Foster argues that we should not defer to Mayo's strategic judgment because the attorney breached his duty to investigate the defendant's history of mental illness. Accordingly, our threshold inquiry is whether Virgil Mayo conducted a reasonable investigation into Foster's psychiatric difficulties.

Mayo assumed responsibility for Foster's case approximately a month before trial. He interviewed Foster on at least ten separate occasions and discussed Foster's history of mental illness during a number of these interviews. Mayo spoke to Foster's mother and ex-wife. In addition, Mayo interviewed various members of the community who were familiar with Foster. After he learned of Foster's mental disturbance, Mayo reviewed the court records of the two involuntary commitments. Mayo then discussed Foster's condition with a judge who had handled the proceedings and a psychiatrist who treated Foster.[8] Finally, Mayo reviewed the reports of the three court-appointed psychiatrists.

Foster criticizes Mayo for not pursuing two additional sources of evidence. First, Mayo did not review Foster's medical records. Second, except for a brief con-

versaton with Dr. Mason immediately preceding his testimony, Mayo did not talk to the three court-appointed psychiatrists.

When assessing a decision not to investigate, we must make "every effort...to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." **Strickland v. Washington,** 466 U.S. at 689. Counsel need not "pursue every path until it bears fruit or until all available hope withers." **Solomon v. Kemp,** 735 F.2d 395, 402 (11th Cir. 1984), (Quoting **Lovett v. Florida,** 627 F.2d 706, 708 (5th Cir. 1980), **cert. denied,** 456 U.S. 949 (1982), **cert. denied,** 469 U.S. 1181; **see also Washington v. Watkins,** 655 F.2d 1346, 1356 (11th Cir. Unit A 1981). The appropriate legal standard is not error-free repre-

sentation, but "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." **Strickland v. Washington**, 466 U.S. at 691; **see also Darden v. Wainwright**, 106 S.Ct. 2464, 2475 (1986).[9] Accordingly, it is necessary to review those factors that influenced Mayo's decision to forego further investigation into Foster's mental illness.[10]

What counsel's investigation had revealed up until this time was a history of bizarre, self-destructive behavior intertwined with episodes of drug and alcohol abuse. A full medical account of Foster's emotional disturbance would certainly bring out these less sympathetic aspects of Foster's character. **See, e.g., Magwood v. Smith**, 791 F.2d 1438, 1445 (11th Cir. 1986) (deferring under similar circumstances to counsel's decision not to

present detailed medical evidence).[11] Detailed medical evidence could do more harm than good by opening the door to harmful cross-examination or rebuttal.[12] At the same time, such evidence would be of little persuasive value. From statistical studies and his own personal experience, counsel knew that psychiatric testimony would "not [be] very popular" with a Bay County jury. **Cf. Songer v. Wainwright,** 733 F.2d 788, 791 (11th Cir. 1984) (counsel could conclude from experience that evidence of drug use would result in jury prejudice), **cert. denied,** 469 U.S. 1133 (1985).[13]

In addition the three court-appointed psychiatrists had unanimously agreed that Foster was sane at the time of the homicide. Two of these doctors, Dr. Mason and Dr. Sapoznikoff, had been the psychiatrists most intimately involved in

Foster's treatment.[14] Counsel had little reason to doubt that the conclusion of Foster's own psychiatrists would remain the bottom line. **See Foster v. Strickland,** 707 F.2d at 1343. Even if counsel were to uncover expert testimony contradicting these psychiatrist's conclusions, the introduction of this material might damage the defense's credibility and alienate the jury.[15] "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." **Cape v. Francis,** 741 F.2d 1287, 1301 (11th Cir. 1984), **cert. denied,** 106 S.Ct. 281 (1985); **see, e.g., Boykins v. Wainwright,** 737 F.2d 1539, 1543 (11th Cir. 1984) (counsel's failure to adduce additional testimony concerning defendant's sanity did not cause a "breakdown in the

adversary process," even though such evidence would have been "helpful" to his client), **cert. denied,** 470 U.S. 1059 (1985).

Foster nevertheless argues that, even if there was to be no insanity defense, counsel should have searched for additional evidence that would have supported mitigation of the death penalty.[16] According to Foster, the medical records and the psychiatrists were likely sources of this material. To be sure, Foster had accumulated a potpourri of diagnoses, and his records were well stocked with the observations and reflections of his psychiatrists. Mayo, however, had before him the opinions of three experts, two of whom had been intimately involved with Foster's treatment. Mayo had little reason to believe that medical records and interviews with the psychiatrists would provide

information that would materially add to the general information before him concerning Foster's illness. At this point Mayo was sufficiently well-informed to reach his conclusion that the introduction of expert testimony and medical evidence could accomplish little that would not be achieved far more effectively through the testimony of Foster's ex-wife.[17] Counsel had no cause to suspect that additional medical evidence would lead him to reassess his conclusion. Under these circumstances, counsel's decision not to pursue additional medical evidence was supported by "reasonable professional judgment" and counsel's decision to rely on lay testimony and to avoid the excessive use of medical evidence was a "reasonable decision that [made] particular investigations [into medical evidence] unnecessary." **Washington v. Strickland**, 466 U.S. at 690-91.[18] As

such, counsel had no need to further familiarize himself with the clinical niceties of Foster's illness. **See, e.g., Burger v. Kemp,** 753 F.2d 930, 937 (11th Cir.) (reasonable to terminate investigation into defendant's background where counsel made strategic decision to avoid emphasizing character evidence), **vacated on other grounds,** 106 S.Ct. 41 (1985), **on remand,** 785 F.2d 890 (11th Cir.), **cert. denied,** 107 S.Ct. 397 (1986).[19]

After careful review of the record, we conclude that counsel formulated his trial strategy only after frequent consultations with his client and an informed evaluation of all his options. **See Mulligan v. Kemp,** 771 F.2d 1436, 1440 (11th Cir. 1985); **Washington v. Watkins,** 655 F.2d at 1355. Foster's second habeas petition is but a thinly disguised rehash of his previous

attack on this strategy. Our holding remains unchanged: we will not lightly second-guess the considered judgments of competent counsel. **Ford v. Strickland,** 696 F.2d 804, 820 (11th Cir.), **cert. denied,** 464 U.S. 865 (1983); **Williams v. Maggio,** 679 F.2d 381, 392 (5th Cir. Unit A 1982), **cert. denied,** 463 U.S. 1214 (1983).

AFFIRMED.

FOOTNOTES

1/ Mayo promptly moved for a continuance and additional psychiatric examinations. This motion was denied.

2/ The only evidence adduced by the state in the sentencing trial consisted of additional photographs of the victim's wounds.

3/ The documents themselves, which were admitted into evidence, contained somewhat more detail. For example, the paperwork resulting from the 1970 commitment shows that Foster was deemed to be "incompetent by reason of paranoid reaction;...that his competency is acute....[and] chronic...[and] that his propensities are delusional thinking...." The documents resulting from the 1974 commitment describe "drug abuse" and "hostile, combative behavior."

4/ The three psychiatrists had examined Foster at the court's request.

5/ The procedural history of this case through the resolution of Foster's first petition for federal habeas corpus is set forth in **Foster v. Strickland,** 707 F.2d 1339 (11th Cir. 1983), **cert. denied,** 466 U.S. 993 (1984). **See also Foster v. State,** 400 So.2d 1 (Fla. 1981); **Foster v. State,** 369 So.2d 928 (Fla. 1979).

6/ Foster noted numerous deficiencies in his counsel's performance throughout the trial. **See Foster v. Strickland,** 707 F.2d at 1342-44.

7/ The Supreme Court has articulated a two-prong test for determining whether a litigant has been denied effective assistance of counsel. **Strickland v. Washington,** 466 U.S. 668 (1984). First, the defendant must show that counsel's performance fell below an objective standard of reasonableness. Second, the defendant must show that there is a reasonable probability that, but for counsel's performance, the result of the proceeding would have been different. **Strickland,** 466 U.S. at 687-88, 694. We conclude that Foster does not meet the requirements of the first prong of the test, and therefore we do not reach the second prong.

8/ Mayo was familiar with this psychiatrist, Dr. Dunlan Wilensky, because Mayo had used Wilensky's testimony to obtain a "mercy verdict" for another client.

9/ Of course, "[the adversarial] testing process generally will not function properly unless defense counsel has done various defense strategies." **Kimmelman v. Morrison,** 106 S.Ct. 2574, 2588 (1986). Such an investigation includes at a minimum an independent examination of the relevant facts, circumstances, pleadings and laws.

Mulligan v. Kemp, 771 F.2d 1436, 1442 (11th Cir. 1985) (quoting **Rummel v. Estelle**, 590 F.2d 103, 104 (5th Cir. 1979); **see also Nealy v. Cabana**, 764 F.2d 1173 (5th Cir. 1985).

10/ Foster propounds a very different test based upon "a comparison between the mitigating evidence defense counsel presented with the mental mitigating evidence he did not present due to his failure to investigate." From Foster's point of view, this test has much to recommend itself. The medical records from Florida State Hospital, for example, show that four doctors opposed Foster's release because they foresaw a poor prognosis. In sum, these medical records document a pattern of psychotic behavior and delusional thinking which led a lower court to conclude that "insanity defense, effectively presented during the guilt phase, may have had an excellent change of success."

Unfortunately, Foster's approach is erroneous because it adopts "the omniscient perspective" of hindsight, rather than counsel's perspective at the time of the challenged actions. **See Mulligan v. Kemp**, 771 F.2d 1436 (11th Cir. 1985) (citing **Strickland v. Washington**, 466 U.S. 668).

11/ **See also McCleskey v. Kemp**, 753 F.2d 877, 900 (11th Cir. 1985) (failure to subpoena robbery victims was reasonable where attorney feared undermining alibi defense), **aff'd**, 107 S.Ct. 1756 (1987); **Adams v. Wainwright**, 709 F.2d 1443, 1446

(11th Cir. 1983) (where raising defendant's background "might do more harm than good," failure to present such evidence was reasonable), **cert. denied**, 464 U.S. 1063 (1984).

12/ Character evidence poses similar difficulties. When confronted with an analogous situation, courts generally defer to the strategic judgment of counsel. **See, e.g., Darden v. Wainwright**, 106 S.Ct. 2464, 2474 (1986); **Adams v. Wainwright**, 709 F.2d at 1446; **Stanley v. Zant**, 697 F.2d 955, 965 (11th Cir. 1983), **cert. denied**, 467 U.S. 1219 (1984); **Easter v. Estelle**, 609 F.2d 756, 759 (5th Cir. 1980).

13/ Counsel gave the following testimony before the lower court:

> Although, in Kenny's case, I was afraid of some very damaging, or aspects with a lay jury and as, as you know, the actual insanity defense as such is not very popular with the jurors especially as I found in this area and in the State of Florida from the statistics I see, but it was a back door sort of insanity defense in which I was hoping to use that phrase of the charging and judging of events and the depraved mind in the case. I really prosecuted for second degree murder myself. [sic]

In fact, Mayo truncated Dr. Mason's testimony at trial because he saw that the jury "wasn't buying."

14/ Foster points this out in his brief. It was Dr. Mason and Dr. Sapoznikoff who supplied most of the medical information in the commitment papers.

15/ **Cf. Mulligan v. Kemp,** 771 F.2d 1436, 1444 (11th Cir. 1985) (reasonable not to put on character witnesses who, as jury learned from guilt/innocence phase, were willing to perjure themselves.

16/ We assume **arguendo** that his duty remained unaltered. In fact, there are circumstances in this case that may have operated to narrow this duty. throughout his relationship with Mayo, Foster took an extremely unrealistic view of his options and proved an inordinately uncooperative client. Foster instructed his attorney not to raise the issue of insanity during the guilt/innocence phase, although it is not clear whether these instructions also included the sentencing proceedings. Specifically, Foster told his lawyer he desired a "walk or burn" defense.

On one hand, it is clear that a defendant's instructions may limit the scope of counsel's duty to investigate a particular defense or strategy. **See Tafero v. Wainwright,** 796 F.2d 1314, 1320 (11th Cir. 1986); **Mitchell v. Kemp,** 762 F.2d 886, 889-90 (11th Cir, 1985); **Grey v. Lucas,** 677 F.2d 1086, 1094 (5th Cir. 1982), **cert. denied,** 461 U.S. 910 (1985); **cf. Strickland**

v. Washington, 466 U.S. at 691. On the other hand, it is equally clear that lawyers may not follow such commands blindly. Although the defendant may retain the right to control his defense at trial, counsel must first advise his client which strategies offer the best chance of success. **Thompson v. Wainwright,** 787 F.2d 1447, 1451 (11th Cir. 1986), **cert. denied,** 107 S.Ct. 1986 (1987); **Mulligan v. Kemp,** 771 F.2d 1436, 1442 (11th Cir. 1985).

Uncounseled jailhouse bravado should not deprive a defendant of his right to counsel's better-informed advice. **Thompson v. Wainwright,** 787 F.2d at 1451 (quoting **Martin v. Maggio,** 711 F.2d 1273, 1280 (5th Cir. 1983), **cert. denied,** 469 U.S. 1028 (1984). This principle especially holds true where a possible mental impairment prevents the client from exercising proper judgment, **id.** at 1451 (citing Model Code of Professional Responsibility EC-7-12 (Fla. Stat. Ann. 1983)), or where a defense, **cf. Washington v. Strickland,** 693 F.2d 1243, 1252 (5th Cir. Unit B 1982) (en banc), **rev'd on other grounds,** 466 U.S. 668 (1984).

We do not need to determine the boundaries of counsel's duty in the present case because we hold that counsel's investigation would have been adequate even had there been no limiting circumstances.

17/ On direct, Mrs. Foster told of her ex-husband's irrationality, self-mutiliation, and suicidal urges. On cross-examination, she made the following plea:

He is a very sick person and I have begged for help for him and so has his mother and we could not get any help from nobody. They would rather put him in the electric chair and kill him than send him to an institution where he can get help. He has been to the mental health unit on a whole lot of occasions and they let him out and they give him pills to calm his nerves and the judge won't do anything. He promised that he would. I have talked to Dr. Mason and he promised he would and I talked to Dr. Cluxton and he promised he would. And everybody at the Bay County Sheriff's Department knows me and any time I have ever had any occasion to talk to any of them, asking them to do something for him and nobody will. And they still won't because it's much easier to just go ahead and electrocute him and get it over with so they don't have to worry about somebody whose mind is bad. If he had T.B. or anything they would put him in an institution and they would help him where he couldn't hurt anybody but just because his mind is bad people don't understand that. They think it's all right just to go ahead and get him out of

> society. But why don't they get him out of society before a crime like this had to be committed.

Foster v. Strickland, 516 F. Supp. 597, 603-04 (N.D. Fla. 1981), **aff'd**, 707 F.2d 1339 (11th Cir. 1983), **cert. denied**, 104 U.S. 2375 (1984).

18/ The present case should be compared to those decisions where we concluded that counsel's performance was deficient bec use of a failure to investigate. **See, e.g., Kimmelman v. Morrison**, 106 S.Ct. 2574, 2588-89 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); **Code v. Montgomery**, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); **Thomas v. Kemp**, 796 F.2d 1322, 1324 (11th Cir.) (little effort to obtain mitigating evidence), **cert. denied**, 107 S.Ct. 602 (1986); **Aldrich v. Wainwright**, 777 F.2d 630, 633 (11th Cir. 1985) (failure to depose any of the state's witnesses), **cert. denied**, 107 S.Ct. 324 (1986) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), **cert. denied**, 471 U.S. 1016 (1985); **Gaines v. Hopper**, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); **Gomez v. Beto**, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); **see also Nealy v. Cabana**, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

19/ **See also Songer v. Wainwright,** 733 F.2d 788, 791 (11th Cir. 1984) (further investigation of drug abuse unnecessary where counsel had concluded that such evidence would be harmful), **cert. denied,** 469 U.S. 1133 (1985); **cf. Mulligan v. Kemp,** 771 F.2d 1436, 1443 (11th Cir. 1985) (failure to request state's witness list not ineffective where counsel already aware of "boundaries of the state's case").

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CHARLES KENNETH FOSTER,

Petitioner,

v. MCA 84-2143-RV

LOUIE L. WAINWRIGHT, Secretary, Department of Correctons; JIM SMITH, Attorney General, State of Florida,

Respondents.

ORDER DENYING MOTION TO ALTER OR AMEND

Petitioner Charles Kenneth Foster has moved to alter or amend the judgment entered herein on June 5, 1986. (Doc. 45) The petitioner claims it ws error for this Court to find that petitioner Foster's lack of cooperation in the development of a mental health defense served to excuse his attorney's failure to locate the documents identified herein as Exhibits 3 and 4.

As I noted in my earlier order, however, attorney Mayo was well aware that Foster had a long history of mental illness, and Mayo attributed many of the difficulties he had in dealing with his client to that mental illness. Based upon this, petitioner now maintains that this severely affects the attorney's deference to a client's wishes when the client has an impaired capacity to make "informed strategic choices." **Strickland v. Washington**, 466 U.S. 668, 691 (1984). In this regard, the petitioner relies upon the recent Eleventh Circuit opinion in **Thompson v. Wainwright**, 787 F.2d 1447, 1451 (11th Cir. 1986):

> An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment.

I note, however, that in **Thompson**, the attorney had made **no** investigation. Here,

the record reflects that Mayo had made a rather extensive investigation, even though he had not located Exhibits 3 and 4.

Petitioner also relies upon the former Fifth Circuit opinion in **Davis v. State of Alabama**, 596 F.2d 1214, 1220 (5th Cir. 1979), **vacated as moot**, 446 U.S. 903 (1980), to the effect that the finding that Foster was competent to stand trial:

> ...does not entitle his counsel to act as if the defendant were intelligent, articulate, and learned in the law. An attorney must take account of his client's particular incapacities and weaknesses, and a reviewing court must examine the specific dealings between them.

I find that the record supports the conclusion that Mayo did make every effort to take into account Foster's particular incapacities and weaknesses. The standard for effective assistance of counsel is not perfection. Under the circumstances,

attorney Mayo was a professional and effective counsel.

The motion is DENIED.

DONE AND ORDERED this 14th day of July, 1986.

/s/
ROGER VINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CHARLES KENNETH FOSTER,

Petitioner,

v. MCA 84-2143-RV

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; JIM SMITH, Attorney General, State of Florida,

Respondents.

ORDER LIFTING STAY OF EXECUTION

Charles Kenneth Foster's scheduled execution was stayed by order entered herein on October 15, 1984. I entered the stay because, after hearing approximately four hours of testimony regarding the petitioner's second federal habeas corpus petition, it was clear that the petitioner was challenging the truthfulness of the testimony of a key witness and, thereby, a crucial factual determination made by this

Court in ruling upon the petitioner's original petition. This matter was thereupon assigned to the United States Magistrate for the scheduling and conduct of an additional evidentiary hearing, and for a report and recommendation.

The Magistrate's report and recommendation was filed October 11, 1985, and copies were furnished to all parties. Both the petitioner and the respondents have taken advantage of the opportunity to file objections, pursuant to Title 28, **United States Code,** Section 636(b)(1). I have carefully considered the report and recommendation, and the objections thereto timely filed by the parties. I have also considered the responses filed by each side to the other party's objections.

Preliminarily, it must be noted that petitioner Foster has challenged the accuracy of the testimony given by Florida

Fourteenth Judicial Circuit Public Defender Virgil C. Mayo at the first federal habeas corpus hearing conducted in Panama City, Florida, before United States District Judge Lynn C. Higby. Mr. Mayo was petitioner Foster's trial counsel in his 1975 trial at which he was convicted and sentenced to death. The evidence is very clear to me now, and I so find, that attorney Mayo did **not** have the various hospital records from the Bay County Medical Center or from the Florida State Hospital at Chattahoochee, Florida, identified herein as Exhibits 3 and 4, at the time of petitioner Foster's trial. At the first federal habeas corpus hearing, attorney Mayo had testified that he **did** have those records, but elected not to use them. Thus, the issue now is clearly a "failure to investigate" claim, in contrast to the "failure to present" claim

which was initially presented to this Court, the denial of which was affirmed in **Foster v. Strickland,** 707 F.2d 1339 (11th Cir. 1983).

Under the facts of this case, therefore, the Magistrate found that this matter should not be barred as a successive petition or an abuse of the writ under Rule 9(b), rules governing Section 2254 cases in the United States District Court. I agree.

Substantively, this case presents the very basic issue of whether the petitioner's trial attorney, by his failure to investigate and locate, and to utilize in the penalty phase of trial, the petitioner's particular medical and mental health records that have been collectively identified herein as Exhibits 3 and 4, failed to meet the benchmark standards for effective assistance of counsel as set forth in **Strickland v. Washington,** 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Magistrate has determined that the petitioner's attorney was effective as evaluated by these standards, and I agree.

Specifically, the petitioner raises six objections to the report and recommendation. First, petitioner Foster objects to the Magistrate's finding that he interfered with Attorney Mayo's efforts to investigate and present the mental health defense at the penalty phase of his trial. Foster maintains that although he had adamently prevented the use of this defense at the guilt phase, he did not preclude use of it at the penalty phase. He particularly relies on the fact that Attorney Mayo has never claimed that Foster told him not to investigate or present the mental health defense in the second phase.

The petitioner, however, ignores the effect of his own lack of cooperation on

the development of that defense. Mr. Mayo was representing a client who had confessed to police that he had committed the homicide; who did not wish to have his mental illness history exposed; who had blurted out a curse-filled courtroom confession; who had repeatedly declared that he wanted either to go free or die; who had expressed his wish to be hung in the courthouse square; and who had gone from ignoring the advice of counsel to being non-communicative and sullen.

It appears that the very mental illness which might have mitigated against Foster's death penalty may have prevented Mr. Mayo from investigating and presenting that defense. However, petitioner Foster had been found competent to stand trial and to assist in his own defense by three court-appointed psychiatrists. Under these circumstances, Mr. Mayo's judgment not to

pursue further investigation in that area and to "soft pedal" the mental health defense at the penalty phase was reasonable. His years of experience with juries in North Florida, as well as his more recent experience with the petitioner, cautioned against heavy reliance on his client's mental illness. Mayo's experience and qualifications are set out at length in this Court's first habeas corpus petition order. **See Foster v. Strickland,** 517 F.Supp. 597, 600 (N.D. Fla. 1981).

Second, petitioner Foster also objects to the timing of Mayo's decision not to present psychiatric opinions concerning Foster's mental illness. Mayo testified in 1981 that he remembered his penalty phase strategy as a "low key" presentation of the mental illness in which he would rely on Mr. Foster's ex-wife's testimony to arouse sympathy. In his testimony here in 1985,

Mr. Mayo indicated that he recalled the jury's unfavorable response to Dr. Mason and, therefore, determined to move on to Mrs. Foster's testimony. Whether May had a strategy which was reinforced by his perception of the jury's reaction, or whether he changed strategies due to the perception, is of little consequence. Either way, the totality of the circumstances demonstrate that the attorney's decision was reasonable.

In connection with this second objection, Foster alleges that had Mr. Mayo perceived a different reaction by the jurors, he would not have been prepared to present **all** the evidence conerning Foster's mental history. Although Mayo could have continued with the examination of Dr. Mason, there is nothing in the record to show Mayo's preparedness to submit a "full blown" psychiatric history. From Mayo's

total testimony, one could infer that even if Mr. Mayo had had all possible documents, he would not have presented them, but rather would have moved on to Mrs. Foster's very emotional and moving testimony. Further, as noted in this Court's earlier order, much of the additional evidence would have necessarily carried along some very prejudicial facts, for example, that Foster once took his mother's car from her at knifepoint; that he had raped two women, one of whom was his sister-in-law; that he had a long history of violent crimes and threats, even including a threat to kill his younger brother and cook him for supper. [**See Foster v. Strickland, supra,** at 603-05]

Petitioner Foster's third objection is to the Magistrate's finding that Mayo was aware of the "salient features" of Foster's mental condition. Foster maintains that

without a review of the medical records and thorough discussions with Foster's treating psychiatrists, he was unaware of the salient factors, and even misperceived Mr. Foster's illness. As will be further addressed later, I agree with the petitioner that his attorney was not fully informed of his history of paranoid schizophrenia. Nonetheless, Mr. Mayo was aware of the "salient factors" of Mr. Foster's hospitalizations; of several diagnoses which labeled him psychotic (but also others that found him non-psychotic); his violent behavior toward himself and others; and of the somewhat conflicting findings of the three court-appointed psychiatrists. Knowledge of the "salient factors" must be considered, as the report and recommendation reflects, "under the particular facts of this particular case." In this case, "the defense counsel

had been flatly instructed not to pursue an insanity defense in any manner. It cannot be said that defense counsel's failure to ferret out every single set of documents relating to the petitioner's mental condition was tantamount to ineffective assistance."

Some additional observations are in order. It is now clear that an insanity defense, effectively presented during the guilt phase, may have had an excellent chance of success. Undoubtedly, the most revealing evidence is the record of the Florida State Hospital regarding the staff's decision in 1971 to discharge Foster. At the staff conference, Doctor Cespedes related the history and treatment of the patient, and concluded:

> I believe this patient is in remission and that he may be sent back to the court to respond to his charges. His diagnosis is Schizophrenic, Paranoid Type, In remission.

The other six members of the staff responded as follows:

Mr. Auerbach: I believe that the patient should not be released and remain in the hospital for further treatment.

Dr. Cook: I agree with Mr. Auerback.

Dr. Dunin: I wish to disagree with psychological department, but this time I agree. I think that this patient is improved, yes, but not to such an extent that he can be considered a candidate for discharge. If there would be any possibility of releasing him on trial visit I probably would agree with Dr. Cespedes and release the patient, but I feel that the patient did not receive sufficient benefits from hospitalization by one or another reasons and he is still floating and his associations are not such that he will be able to provide for his needs and the needs of his family. I propose trial visit status rather than competency discharge.

Dr. Cordoba: I agree.

Dr. Pierson: In my opinion there is little doubt that this was schizophrenia and he is currently schizophrenic in remission. The problem is whether he should continue in the hospital or a deliberate calculated risk should be taken and he should be released. In my opinion this patient will not gain any thing further from hospitalization and although he does represent a risk, I think this is a risk which has to be taken, otherwise, this patient will remain permanently institutionalized until he dies because I do not imagine there will be any further improvement from either chemotherapy, group therapy or hospital milieu-therapy and I would therefore recommend that he be released only understanding he does present a more than average risk.

Dr. Gumanis: I agree with disposition.

CONSENSUS OF OPINION:
GRANTED COMPETENCY DISCHARGE

Thus four of the seven expressed opinions opposed release, but Drs. Pierson, Gumanis,

and Cespedes prevailed and Foster was released. Dr. Pierson observed that he could foresee no "further improvement," recognizing that Foster was "a more than average risk."

Despite the clear "calculated risk" involved in releasing Foster, there was apparently no follow-up done by the state hospital, or even a communication of his diagnosis and treatment needs to Foster's local mental health facility. The record reflects that between the time of his release from the state hospital on September 2, 1971, and the time of his arrest for murder in July 1975, Foster was involuntarily hospitalized at the Bay County Medical Center for mental health problems on at least six occasions. The frequency of these hospitalizations increased noticeably toward the end of this period. None of the local psychiatrists

noted the state hospital's evaluation. For example, Dr. Sapoznikoff (one of the three psychiatrists who provided evaluations of competency to the trial court) treated Foster on several occasions. In his discharge summary of September 29, 1972, however, Dr. Sapoznikoff noted: "There is no past history of psychiatric hospitalization or treatment."

The delusional thinking and psychotic behavior recognized in Exhibits 3 and 4 are consistent with the evidence of the petitioner's reported behavior on the evening of the murder. For example, it was established that Foster accused Julien Lanier (the victim) of taking liberties with his "sister" just as Lanier and one of the two women with them (neither of whom was Foster's sister) were about to engage in sexual intercourse, and that Foster then brutally attacked and killed Lanier.

From Attorney Mayo's testimony, it does not appear that he ever realized how serious the petitioner's mental condition was, nor the exact nature of that condition, although he **thought** he did.

Fourth, Foster objects to the Magistrate's finding of time constraints in the development of the petitioner's defense. Foster points out that Mayo never maintained that the limited time frame prevented further investigation. However, the penalty phase of the trial was held one day after the return of the jury's verdict in the guilt phase. In light of Foster's witness stand confession and the general developments of the guilt phase of the trial, Mayo might well have reassessed his penalty phase strategy and in connection with it done more investigation had there been more time. But the time was limited; despite his request for more time, he was

given only one day to prepare, which allowed very little additional preparation or re-evaluation.

Finally, petitioner Foster object to the Magistrate's reliance upon certain language by the Court of Appeals affirming the denial of Foster's first habeas corpus petition. The Magistrate's use of the Eleventh Circuit's comments concerning Foster's psychiatric evaluations was to assist in describing the difficult situation Mr. Mayo faced in defending his client. The Magistrate was not addressing Foster's trial competency per se.

Foster complains that the Magistrate quoted the Eleventh Circuit's holding regarding use of the insanity defense in the **guilt** phase. The Magistrate found this determination equally as applicable to the sentencing phase as the Eleventh Circuit had found it to the guilt phase. Although

petitioner's inference in the penalty phase was qualitatively different from the adamant preclusion in the guilt phase, he was, nonetheless, instrumental in preventing its presentation.

Petitioner Foster also objects to reliance on the Eleventh Circuit's reasoning concerning the failure to present a mental illness defense. The Magistrate's reliance is well-placed. Chronologically in a criminal case, a defense attorney first investigates and then makes a determination concerning trial strategy. It does not necessarily follow that in reviewing an ineffectiveness of counsel claim that the two are so distinct that they can be subjected to two totally independent, non-overlapping analyses. Under the unique circumstances of this case, the two were inextricably intertwined. In this regard, the Supreme Court of the United States has,

in **Strickland**, supplied an example which is particularly applicable to this case:

> [W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.
>
> **Strickland v. Washington, supra,** 80 L.Ed. 2d at 696 (1984).

Here, Mayo relied not only on what Foster had told him, but on court records, conversations with a treating psychiatrist and with members of Foster's family and the community, and the opinions of the three competency psychiatrists. Also, Mayo had reason to believe, due to the investigation

he had done, that further investigation would be at best cumulative. Under the standards of **Strickland v. Washington,** Mayo did not render ineffective counsel to Foster by failing to further investigate his mental condition and records thereof.

The following corrections should also be made to the report and recommendation:

(a) At pages 2-3, the Magistrate found that the petitioner appealed to the First Circuit [sic] Court of Appeals and thereafter filed a petition for writ of certiorari in the Florida Supreme Court. This is inaccurate, because his appeal from the trial court was taken directly to the Supreme Court of Florida and was affirmed in 1979. [**Foster v. State,** 369 So.2d 928 (Fla. 1979)] There was no appeal to the intermediate appellate court.

(b) At page 3, the Magistrate finds that "Attorney Burr entered the case at the

request of Louis Carres, who at the time was working as an attorney in the Public Defender's office in Tallahassee, Florida." The record reflects, however, that Attorney Burr did not enter the case at the request of Mr. Carres, but rather at the request of petitioner Foster.

(c) At page 5 of the report and recommendation, the Magistrate notes that the evidentiary hearing previously held before Judge Higby was held on April 18-19, 1981. That hearing was, instead, held on **June** 18-19, 1981.

(d) At page 23, the Magistrate finds that Mr. Mayo spoke to "some psychologists or psychiatrists" at Florida State Hospital in investigating Mr. Foster's mental illness. The record indicates that Mr. Mayo spoke to only one psychiatrist at Florida State Hospital.

Having considered the report and recommendation and all objections and responses thereto filed by the parties, I conclude that the report and recommendation, as clarified above, should be adopted.

Accordingly, it is now ORDERED:

(1) The Magistrate's report and recommendation, as clarified herein, is adopted and incorporated by reference in this order.

(2) The petition for writ of habeas corpus should be, and the same is hereby, DENIED.

(3) The Court's order of October 15, 1984, staying execution, is hereby VACATED and set aside.

DONE AND ORDERED this 5th day of June, 1986.

/s/
ROGER VINSON
United States District Judge

SUPREME COURT OF FLORIDA

No. 65,967

CHARLES KENNETH FOSTER, Petitioner,

v.

LOUIE L. WAINWRIGHT, Respondent.

[October 10, 1984]

ADKINS J.

We have before us a petition for a writ of habeas corpus. Jurisdiction of this Court is invoked pursuant to article V, section 3(b)(9), of the Florida Constitution.

On October 3, 1975, petitioner was convicted of first-degree murder and robbery. The following day, he was sentenced to death upon the conviction for murder in the first degree, and to life imprisonment upon the conviction for

robbery. This Court affirmed both of petitioner's convictions and sentences on February 22, 1979, and denied rehearing on May 10, 1979. **Foster v. State,** 369 So.2d 928 (Fla. 1979). The United States Supreme Court denied certiorari on October 1, 1979. **Foster v. Florida,** 444 U.S. 885 (1979).

On September 29, 1980, petitioner joined with 122 other capital defendants in challenging Florida's death penalty statute by habeas corpus petition. This Court decided the claim adversely to petitioner's prayer for relief. **Brown v. Wainwright,** 392 So.2d 1327 (Fla. 1981).

Subsequent to the signing of a warrant setting his execution, petitioner filed a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Relief was summarily denied. On appeal to this Court, the trial court's

order denying post-conviction relief was affirmed. **Foster v. State,** 400 So.2d 1 (Fla. 1981).

Thereafter, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida. On July 2, 1981, judgment was entered denying his petition. **Foster v. Strickland,** 517 F.Supp. 597 (N.D. Fla. 1981). The Eleventh Circuit affirmed the district court's denial of relief. **Foster v. Strickland,** 707 F.2d 1339 (11th Cir. 1983). Petitioner then applied for certiorari relief to the United States Supreme Court. This was denied in **Foster v. Strickland,** 104 S.Ct. 2375.

The facts of this case are set forth in **Foster v. State,** 369 So.2d 928 (Fla. 1979), and need not be repeated here.

Petitioner argues that he did not receive meaningful appellate review of his death sentence because this Court's consideration of whether to use non-record materials in the review of petitioner's death sentence on direct appeal was not made known to his counsel. This issue was settled in **Brown v. Wainright,** 392 So.2d 1327 (1981), which held that availability of information to this Court concerning capital defendants, which was not presented at trial and was not part of the trial record or record on appeal was not unconstitutional. Thus, we find that all of the matters relating to incompetency in petitioner's petition for habeas corpus and its supplement are cumulative to evidence presented at the trial.

Petitioner further argues based upon **Magill v. State,** 386 So.2d 1188 (Fla. 1980), that this cause should be remanded

to the trial court for resentencing because the trial judge failed to articulate any mitigating circumstances considered by him before imposing the death sentence.

Petitioner's attorney argued on appeal that the trial court did not find any mitigating circumstances in the instant case. We find this same argument in habeas corpus proceedings to be without merit.

Petitioner finally contends that the concern for proportionality in capital sentencing requires a remand for the reimposition of the sentence in the instant case. This issue was disposed of on direct appeal where this Court found that the sentence imposed was proportionate in comparison to other similar death cases decided by the Court. **Foster v. State,** 369 So.2d 928 (Fla. 1979). We find it unnecessary to revisit this argument.

There is nothing in the petition for habeas corpus or its supplement that convinces the Court that petitioner is entitled to any relief. Petitioner's arguments are without merit.

Accordingly, we hold that the petitioner is not entitled to relief and deny the petition for writ of habeas corpus.

It is so ordered.

BOYD, C.J., OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur

NO MOTION FOR REHEARING WILL BE ALLOWED

Original Proceeding - Habeas Corpus

Richard L. Jorandby, Public Defender; Craig S. Barnard, Chief Assistant Public Defender; and Richard H. Burr III and Louis G. Carres, Assistant Public Defenders, 15th Judicial Circuit, West Palm Beach, Florida,

for Petitioner

Jim Smith, Attorney General and Gregory C. Smith, Assistant Attorney General, Tallahassee, Florida,

for Respondent

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 14, 1984

Mr. Gregory C. Smith
Assistant Attorney General
The Capitol---Room 1502
Tallahassee, FL

Re: Charles Kenneth Foster,
v. Charles G. Strickland,
Jr., Warden, et al.
No. 83-6583

Dear Mr. Smith:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied. Justice Brennan and Justice Marshall dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we

would grant certiorari and vacate the death sentence in this case.

Very truly yours,

/s/
Alexander L. Stevas, Clerk

Charles Kenneth **FOSTER**, Petitioner,

v.

Charles G. **STRICKLAND**, Jr., et al., Respondents.

No. 81-5734

United States Court of Appeals, Eleventh Circuit,

June 27, 1983.

As Amended on Denial of Rehearing En Banc Nov. 3, 1983.

Steven L. Seliger, Tallahassee, Fla., Richard H. Burr, III, West Palm Beach, Fla., for petitioner.

Gregory C. Smith, Asst. Atty. Gen., Tallahassee, Fla., for respondents.

Appeal from the United States District Court for the Northern District of Florida.

Before **RONEY** and **KRAVITCH**, Circuit Judges, and **TUTTLE**, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

Charles Kenneth Foster appeals from the district court's denial of his petition for a writ of habeas corpus. Petitioner was convicted of first degree murder in Florida

and sentenced to death. In this collateral appeal, he challenges: (1) the competency of his counsel in the guilt and penalty phases of his trial; (2) the constitutionality of instructions to the jury on the weighing of aggravating against mitigating circumstances; (3) the Florida Supreme Court's alleged use of non-record material in reviewing his sentence; and (4) the constitutionality of jury instructions allegedly limiting consideration of non-statutory mitigating circumstances.

After a careful review of the entire record, including petitioner's state trial transcript and the transcript of his federal habeas evidentiary hearing, we affirm the district court's decision with respect to these claims. We are compelled, however, to reverse because of the trial judge's inadequate findings of fact on the

mitigating circumstances, as required by the Florida Death Penalty statute. It is impossible to determine whether petitioner's sentence was the product of reasoned judgment rather than of caprice and arbitrariness, and thus whether it comports with the constitutional requirements expressed by the Supreme Court. **See Gregg v. Georgia**, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); **Proffitt v. Florida**, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1986); **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

I. BACKGROUND

Petitioner was convicted of first degree murder and robbery for the July 15, 1975, killing of Julian Lanier. Petitioner apparently met Lanier for the first time at

a bar on the evening of July 14, where they became acquainted over several drinks. Lanier asked petitioner if he knew of any women they could hire to engage in sexual relations. Petitioner and Lanier then traveled to another bar where they met two women, at least one of whom knew petitioner, and persuaded them to travel to a remote wooded area in Lanier's motorhome. Both petitioner and Lanier were, apparently, quite intoxicated.

In the early morning hours of July 15, just as Lanier and one of the women were about to engage in sexual intercourse, petitioner, without provocation, screamed that Lanier was taking advantage of his sister and brutally attacked Lanier with his fists. Petitioner then slit Lanier's throat with a knife. With the assistance of the two frightened women, petitioner

dragged Lanier out of the motorhome to the woods and covered him, face down, with sticks and leaves. Hearing him breathing, petitioner, with one slice, severed Lanier's spinal cord at the base of his neck. Petitioner and the two women returned to the motorhome, where they allegedly then found Lanier's wallet and divided the money it contained.

Police, acting on information provided by the women, arrested petitioner on the day of the murder. Five days later petitioner gave the police a detailed confession of the crime. His subsequent motion to suppress the confession was denied. Petitioner's appointed counsel then filed a suggestion of insanity, and three court appointed psychiatrits examined petitioner. Two of these psychiatrists had treated petitioner extensively before for

emotional disturbances. All three determined that petitioner was competent to stand trial and that he was likely sane when he committed the crime. The court adopted the psychiatrists' conclusions.

Petitioner was found guilty by a jury on October 3, 1975, of murder in the first degree, Fla.Stat.Ann. 782.04(1) (West Supp. 1982), and of robbery. During the trial, Foster made a dramatic witness stand confession. The jury recommended the death penalty. Judge Spear sentenced petitioner to death on the murder charge and life imprisonment on the robbery charge. Petitioner's motion for a new trial was denied. The Florida Supreme Court, in an automatic appeal mandated by Florida's death penalty statute, affirmed petitioner's conviction and sentence. **Foster v. State**, 369 So.2d 928 (Fla.

1979). A motion for rehearing was denied, as was a petition for certiorari to the United States Supreme Court. 444 U.S. 885, 100 S.Ct. 178, 62 L.Ed.2d 1116 (1979).

On May 5, 1981, the Governor of Florida signed a death warrant ordering petitioner's execution on June 3, 1981. The Florida Circuit Court denied petitioner's aplication for a stay of execution and motion for post-conviction relief on May 5, 1981. The Florida Supreme Court affirmed this decision on May 18, 1981. 400 So.2d 1 (Fla. 1981).

The United States District Court for the Northern District of Florida granted a stay of execution when petitioner sought habeas relief from the district court. 515 F.Supp. 22 (N.D. Fla. 1981). After a two day evidentiary hearing, the district court

denied the petition for writ. 517 F.Supp. 597 (N.D. Fla. 1981). Petitioner appealed to this Court. After hearing oral argument in the case, we deferred consideration until this Court issued its **en banc** decision in **Ford v. Strickland**, 696 F.2d 804 (11th Cir. 1983), because that decision addresses several issues which we face here. We now proceed to a consideration of each of petitioner's claims.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Fourteenth Judicial Circuit Public Defender Virgil Mayo assumed representation of Foster's case from an assistant about a month before the trial. Mayo has been a member of the Florida Bar since 1951. He has represented defendants at numerous criminal trials, having held the public defender's position since 1963. His

experience with capital cases under the recently amended death penalty statute was limited, as was every other attorney's at the time, although Mayo had tried cases under the old statute before it was invalidated by the Supreme Court's decision in **Furman v. Georgia.** Mayo was assisted in the defense by Bill Wagers, a new assistant public defender, whom the district court noted was a highly competent criminal defense lawyer.

Foster asserts that his trial counel rendered ineffective assistance at both the guilt and penalty phases. We turn to these contentions.

A. **Guilt Phase**

Petitioner alleges this his counsel failed to provide adequate representation

during the guilt phase of his trial. He cites numerous instances of this alleged inadequacy, the most significant of which are that: (1) Mayo failed to inform the examining psychiatrist and the court of Foster's "irrational behavior" exhibited at pre-trial conferences; (2) Mayo failed to challenge the psychiatrists' reports on competency by interviewing the psychiatrists and requesting a competency hearing rather than merely submitting the competency issue on the basis of the reports;[1] (3) Mayo failed to raise effectively the competency issue after the confession and after he discovered Foster's use of Valium during the trial; and (4)

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[1] We restrict our consideration here to whether Mayo was ineffective and do not address the issue of whether Foster was indeed incompetent because that issue has not been raised properly before this Court.

Mayo failed to investigate and present an insantiy defense.

[1] In evaluating petitioner's claim, we note that he was not entitled to, "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." **McKinna v. Ellis**, 280 F.2d 592, 599 (5th Cir. 1960), **modified**, 289 F.2d 928 (5th Cir., **cert. denied** 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). In order to establish a claim of constitutionally deficient representation that may be redressed in a habeas action, petitioner must not only show ineffective assistance, he must also "demonstrate that the ineffective assistance created not only 'a **possibility** of prejudice but that [it] worked to his **actual** and substantial disadvantage.'"

Washington v. Strickland, 693 F.2d 1243, 1258 (5th Cir. 1982) (Unit B, **en banc**), **quoting United States v. Frady**, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original).

[2] It is clear from the record that defense counsel performed his duties competently and conscientiously.[2] Mayo did

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[2] We reach this conclusion after conducting an independent analysis of the facts of this case, as this Court has required:

> Whether counsel has rendered effective assistance is a mixed question of law and fact which requires the appellate court to independently apply legal principles to the district court's findings of basic common historical facts of the case. **Young v. Zant**, 677 F.2d 792, 798. Thus, while we must defer to the district court's finding as to what counsel did or did not do, absent a clearly erroneous

not fail to discover information that was necessary for the competent defense of Foster. The district court did not clearly err, based upon our review of the record, in finding that Mayo interviewed Foster's mother and that he studied all the relevant medical records, including the psychiatric reports of Foster's medical records at the hospitals and clinic where his emotional

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[2] Continued

> determination, we independently evaluate whether counsel's representation satisfied the standards of the Sixth and Fourteenth Amendments.

Adams v. Balkcom, 688 F.2d 734, 739 (11th Cir. 1982). See **Washington v. Watkins**, 655 F.2d 1346, 1351-56 (5th Cir. 1981).

The final result of our analysis would not differ if we regarded the district court's finding of ineffective assistance as a question of fact entitled to a presumption of correctness that is reversible only if "clearly erroneous," as arguably suggested by the Supreme Court's analysis in **Pullman Standard v Swift**, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

disturbances were treated. Mayo investigated adequately the competency issue.

Three psychiatrists examined Foster at the court's request, two of whom, Dr. Mason and Dr. Sapoznikoff, had treated him extensively for prior episodes of emotional disturbance. The unanimity of the three professionals that Foster was competent to stand trial and legally sane at the time of the crime weighs heavily against the suggestion that Mayo, by requesting a hearing, somehow could have altered the outcome of the competency determination. Moreover, it does not appear that Mayo possessed any unique information that would have contributed measurably to the doctors' or the court's competency determinations. While Mayo's tetimony indicates he had serious doubts about Foster's psychiatric

health, the testimony does not demonstrate that Mayo believed Foster was **legally** incompetent to stand trial in Florida.

Nor did Mayo act inappropriately following Foster's in-court confession. Mayo promptly raised the competency issue after the confession by moving for a continuance and additional psychiatric examinations. The denial of this motion should not reflect upon Mayo's effectiveness in raising this issue. Nor is it apparent that Mayo should have challenged Foster's competency to stand trial when he later learned that petitioner was taking Valium during the trial. The record fails to indicate that the district court erred in finding that Foster did not sleep through must of his trial and that, in light of Foster's extensive history of prescription and nonprescription drug use,

a dosage of 10 milligrams three times per day of a mild sedative had an insignificant effect on Foster's ability to appreciate the surrounding events.

[3] Petitioner also alleges that Mayo failed to investigate and present an insanity defense. The facts as found by the ditrict court indicate that Mayo had no choice but to refrain from doing so. Mayo apparently favored presenting a second degree murder defense based upon a "depraved mind." Mayo felt he could "sell" such a defense to the jury, based upon Foster's unpredictable and disturbed past and the fact that the victim was drunk and engaging a prostitute at the time of the murder. Over the course of several pretrial conferences, Mayo also explored with petitioner the consequences of pleading not guilty by reason of insanity. Foster

rejected both of these defense strategies and insisted that he pin the blame on the two women present at the murder and attribute his inaction at the time of the killing to one of his infrequent epileptic fits. In light of Foster's adamance, Mayo had an ethical obligation to comply with his client's wishes and was thus unable to present an insanity defense.[3] Petitioner,

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[3] Ethical Consideration 7-7 of the American Bar Association Code of Professional Responsibility provides:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, are binding on his lawyer.... A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular

who preempted his attorney's strategy choice, cannot now claim as erroneous the very defense he demanded Mayo present.[4]

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[3] Continued

> plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

Ethical Consideration 7-8 provides, in pertinent part:

> In the final analysis, however, the lawyer should always remember that the decision to forego legally available objectives and methods because of non-legal factors is ultimately for the client and not for himself.

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[4] Mayo wisely made clear on the record his inability to convince Foster to proceed by what Mayo regarded as the best defense, by examining Foster out of the jury's presence immediately when Foster took the stand as follows:

> By Mr. Mayo:
>
> Q. Your name is Charles Kenneth Foster?
>
> A. Yes sir.

[4] Continued

Q. Are you commonly called Kenny?

A. Yes sir.

Q. Kenny we are out of the presence of the jury and I have discussed this aspect with you, is that correct?

A. Yes sir.

Q. Prior to this time have you been advised that the three psychiatrists and the court has (sic) ruled that you are presently competent to stand trial and that you are competent to aid in the preparation of your defense?

A. Yes sir.

Q. Is it true that both counsel that are present in the court have discussed many times with you your various defenses?

A. Yes sir.

Q. And did we also discuss with you the possibility of the defense of insanity at the time of the crime, not presently, but at the time of the crime?

Petitioner contends that Mayo failed to utilize properly his expert witness, Dr. Mason, to convey the impact of Foster's mental illness upon Foster's ability to appreciate the criminality of his conduct. Petitioner also urges that Mayo

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[4] Continued

A. Yes sir.

Q. Did you direct us to prepare a defense other than that?

A. Yes, I did.

Q. Did we also discuss with you the possibility of defense in which we would attempt to reduce the degree of the offense to second degree?

A. Yes sir.

Q. Did you advise your counsel to prepare a defense other than that?

A. Yes, I did.

Thus, Mayo clearly distanced himself from the theory by which he was compelled to conduct Foster's defense.

was ineffective because he failed to present testimony by friends and family of Foster's "crazy behavior." Thus, petitioner claims, the jury and the judge did not have before them crucial evidence supporting several mitigating circumstances.[5]

Mayo put Foster's ex-wife and Dr. Mason, the psychiatrist, on the stand during the sentencing phase. Foster's ex-wife testified to Foster's disturbed emotional state and Dr. Mason bolstered her testimony with medical corroboration of

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[5] Included among the mitigating circumstances the jury should have considered were whether: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional stress." Fla.Stat.Ann. §921.14(6(b) (West Supp. 1982); and "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Fla.Stat.Ann. §921.141(6)(f) (West Supp. 1982).

Foster's illness. Also, Mayo introduced certain medical records into evidence, so that the jury had, during its deliberation, written evidence of Foster's emotional health.[6]

[4] Mayo's assessment of the Bay County, Florida, jury as more likely to respond to an appeal to emotion than to complicated medical proof, and his consequent presentation of the mitigating evidence in this manner, does not rise to the level of constitutionally ineffective assistance of counsel. The evidence Mayo in fact presented covered essentially the same subjects as that which petitioner

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[6] Mayo had prepared the jury during **voir dire** for the receipt of evidence of Foster's emotional illness by emphasizing how this information could justify a finding of "mercy."

would not have him present. Mayo's choice to present mitigating evidence in the manner he did was a strategic decision informed by years of criminal practice in the region. Mayo's assistance in this regard was not ineffective, nor did it work to petitioner's actual and substantial disadvantage. **Washington v. Strickland**, 693 F.2d at 1260.[7]

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[7] In assessing whether counsel has provided effective assistance in the face of an allegation that he or she failed to investigate or present a particular line of defense, this Court has noted that:

> An attorney who makes a strategic choice to channel his investigation into fewer than all plausible lines of defense is effective so long as the assumptions upon which he bases his strategy are reasonable and his choices on the basis of his assumptions are reasonable.

Washington v. Strickland, 693 F.2d at 1258.

The court in **Washington v. Strickland**

III. WEIGHT OF AGGRAVATING VS. MITIGATING CIRCUMSTANCES

Petitioner alleges that the failure of the court to instruct the jury that any aggravating circumstances must outweigh the mitigating circumstances "beyond a reasonable doubt" for the jury to suggest the death penalty is a denial of due process. Petitioner reasons that the conclusion that aggravating circumstances outweigh any mitigating circumstances is a

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[7] Continued
suggested several factors to employ in determining whether strategic choices based upon a set of assumptions are reasonable, including: the experience of the attorney; the consistency of the lines of defense pursued and not pursued; and the degree of possible prejudice that might foreseeably result from the strategic choice. **Id.** at 1248 n. 23. A consideration of these factors, as well as the concern that presentation of evidence of Foster's "crazy behavior" by using additional family or friends as witnesses could have led to the introduction of some very unsavory testimony concerning petitioner's past acts, leads to the conclusion that Mayo's strategy choice was prudent.

fact "necessary to constitute the crime of" capital murder and therefore is subject to the due process requirement of **In Re Winship**, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), and its progeny of proof beyond a reasonable doubt.

[5] This Court recently held that, under the Florida bifurcated death penalty trial which provides for guilt and penalty phases, the Florida sentencing determination is a separate proceeding dealing with facts that are not elements of the crime itself. **Ford v. Strickland**, 696 F.2d 804 at 817-19. Thus, a finding that the aggravating circumstances outweigh mitigating circumstances is not subject to the due process requirements of **In Re Winship**. The **Ford** court noted that the petitioner in that case seriously confused the proof of facts and the weighing of facts in sentenc-

ing. The court determined that the weighing process, "is not a fact susceptible of proof under any standard...." **Id.**, at 818. The holding of the **Ford** court in this regard applies fully to petitioner's claim in the instant action.

IV. THE **BROWN** ISSUE - NON-RECORD MATERIAL BEFORE THE REVIEWING COURT

Petitioner argues that the Florida Supreme Court relied on nonrecord information, such as psychiatric and pre-sentence investigation reports, in the direct review of his conviction and sentencing. Petitioner claims that this practice infringed on his constitutional guarantees including the right to due process of law, the effective assistance of counsel, confrontation, freedom from cruel and unusual punishment, and the protection

against compelled self-incrimination.[8] He argues that the use of this material runs afoul of the principles of **Gardner v. Florida**, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (petitioner was denied due process when death sentence was imposed, at least in part, on the basis of information that he had no opportunity to deny or explain).

[6] The **en banc** court in **Ford** denied an identical claim in that action. The **Ford** court relied upon the Florida Supreme Court's opinion in **Brown v. Wainwright**, 392 So.2d 1327, **cert. denied**, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981),[9] to

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[8] Petitioner alleges violations of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

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[9] **Brown v. Wainwright** was a direct

conclude that:

> Even if members of the [Florida Supreme C]ourt solicited the material with the thought that it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it was not used, and the rejection of the notion that it affected the judgment of the court ends the matter when addressed at the constitutional level.

Ford v. Strickland, at 811. We therefore deny petitioner's **Brown** claim in the instant action.

V. THE **LOCKETT** ISSUE - INSTRUCTIONS ON MITIGATING CIRCUMSTANCES

Petitioner's final claim is that the trial judge's instructions precluded the jury from considering **non-statutory**

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[9] Continued

petition for writ of habeas corpus by 123 Florida death row inmates alleging the same facts of the receipt of non-record materials during the pendency of their capital case appeals. The Florida Supreme Court denied class relief.

mitigating circumstances, in violation of the holding of **Lockett v. Ohio**, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The Supreme Court in **Lockett** held that the "Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a **mitigating factor**, any aspect of a defendant's character or record and any circumstances of the offense the defendant proffers as a basis for a sentence less than death." **Lockett**, 438 U.S. at 604, 98 S.Ct. at 964-65 (footnote omitted) (emphasis in original).

During the sentencing phase, the trial judge instructed the jury, "The aggravating circumstances which you may consider **are limited** to such of the following as may be established by the evidence." The judge then read the statutory aggravating circumstances. He next instructed on the

mitigating circumstances by stating, "[t]he mitigating circumstances which you may consider if established by the evidence are these." The judge then read the seven statutory mitigating circumstances. Foster contends that this instruction was insufficient to permit the jury reasonably to understand that they were entitled to consider non-statutory factors in mitigation of petitioner's sentence. Petitioner claims tht he adduced evidence of several non-statutory mitigating factors, including: his willingness to cooperate with the police and to confess to the crime; the effect of alcohol, due to his mental illness, on petitioner's ability to premeditate and possess the requisite intent to commit murder; and petitioner's need for psychiatric treatment. The State of Florida argues that consideration of this issue is barred under the procedural

default doctrine of **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 954 (1977), due to Foster's failure to object at trial or to raise this issue on direct appeal.

The petitioner in **Ford** raised a similar **Lockett** claim. In **Ford**, the trial judge instructed the jury, "You shall consider only the following aggravating circumstances...," and read the statutory language. With regard to mitigating circumstances, he said, "You shall consider the following...," omitting the word "only" and reading the statutory mitigating circumstances. The **Ford** Court found that petitioner failed to meed the cause and prejudice exception to **Sykes**. The Court noted that petitioner's trial occurred two years before **Cooper v. State**, 336 So.2d 1133, 1139 n. 7 (Fla. 1976), **cert. denied**,

431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), in which the Florida Supreme Court ruled explicitly that the jury could consider only statutory mitigating circumstances, and four years before **Lockett**, which provided a directly contrary resolution of the issue. Nonetheless, the **Ford** Court refrained from determining whether this constituted "cause" for petitioner's state procedural default because the Court found that petitioner failed to meet the **Sykes** prejudice prong. The Court determined that the challenged jury intructions did not rise to the level of "**actual** and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." **United States v. Frady**, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982) (emphasis in original].

We note at the outset of our analysis that the proof of nonstatutory mitigating circumstances adduced by petitioner bears a striking resemblance to the statutory factors the jury indisputably could have considered. We thus treat all but one category of petitioner's adduced proof as encompassed within the statutory mitigating circumstances. Petitioner's proffered evidence of his willingness to confess and cooperate with the police is the only proof which raises the **Lockett** claim.

We are unable to conclude that Foster's **Lockett** claim is controlled entirely by the **Ford** decision. The **en banc** Court in **Ford** did not reach the merits of the constitutionality of the jury instructions under **Lockett**. Despite the fact that the instructions in **Ford** and the instant action

are virtually identical, several features of petitioner's sentencing hearing militate against applying the **Sykes** bar to Foster's claim. First, the case for cause is similarly strong here as it is in **Ford.** Foster's trial occurred in 1975, one year before **Cooper** and three years before **Lockett.** It would be difficult to characterize the **Lockett** claim as "available" during petitioner's trial, as the Supreme Court recently required to support a finding of procedural default:

> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause for a procedural default.

Engle v. Isaac, 456 U.S. 107, 134, 102 S.Ct. 1558, 1574-75, 71 L.Ed.2d 783 (1982).

The second reason for not applying the **Sykes** bar to Foster's claim rests on the **en banc** court's discussion of the trial judge's order in **Ford** that, "[T]here are no mitigating circumstances existing--either statutory or otherwise--which outweigh any aggravating circumstances." The **en banc** Court interpreted this statement as weighing in favor of the conclusion that the jury did not perceive a restriction on the use of any mitigating evidence and that there was a total absence of such evidence. There was no such indication in the instant action. In addition, as we discuss **infra** at n. 13, petitioner adduced substantial evidence of **statutory** mitigating factors. Thus, **Ford** is not necessarily dispositive of our resolution of the prejudice issue here because of this factual distinction.

[7] While we conclude that the **Ford** decision does not prevent our examination of the merits of petitioner's **Lockett** claim, we find that Foster has failed to adduce sufficient facts to overcome the **Sykes** prejudice prong in order to establish a constitutional claim deserving of redress in this habeas action. The only mitigating factor petitioner proferred, which was not already contemplated by the statutory categories, concerns his willingness to confess and cooperate with the police. The record contains only scant evidence to support this claim. Foster called the police to turn himself in only after investigators had already discovered blood soaked clothes in his bathtub. We decline to regard petitioner's pretrial confession as a factor in mitiga-tion of his crime because petitioner attempted to suppress

this confession. Foster cannot in retrospect claim to have cooperated once he lost his confession motion. Similarly, petitioner waited until he was deeply enmeshed in perjured testimony before he confessed on the witness stand. The circumstances of his confession during trial therefore fairly negate any inference of petitioner's cooperativeness.

Because we are not persuaded that petitioner presented significant nonstatutory mitigating evidence that would justify our overturning the state court's factual findings to the contrary, especially in light of the presumption of correctness that attaches to these findings under 28 U.S.C. §2254(d), we conclude that petitioner's **Lockett** claim is properly barred by the **Sykes** prejudice prong.

THE JUDGMENT OF THE TRIAL COURT DENYING THE WRIT IS AFFIRMED.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is **DENIED.**

ON PETITIONER FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

Upon further consideration, we conclude that the failure of the appellant to raise the issue concerning "the trial court's findings of fact in support of its sentence" in its brief or in oral argument before us forecloses our consideration of the issue **sua sponte.** **Cf. Stephens v.**

Zant, 716 F.2d 276 (5th Cir. 1983), on remand from the Supreme Court of the United States).

That part of our opinion in this case beginning with VI and through the conclusion, together with the dissenting opinion, are hereby stricken and the following is substituted in lieu thereof:

THE JUDGMENT OF THE TRIAL COURT DENYING THE WRIT IS AFFIRMED.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is **DENIED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CHARLES KENNETH FOSTER,

Petitioner,

vs. TCA 81-0847

CHARLES G. STRICKLAND, JR., et al.,

Respondents.

_____/

MEMORANDUM OPINION DENYING PETITION FOR WRIT OF HABEAS CORPUS

Charles Kenneth Foster challenges the legitimacy of his convictions for first degree murder and robbery, confinement, and death sentence in his habeas corpus petition. On May 26, 1981, when Foster filed his petition, he was scheduled for electrocution June 3, 1981. I stayed his execution because Foster was entitled to and had not received an evidentiary hearing on at least one of his claims, the

competency of his trial counsel. June 18, 1981, I held an evidentiary hearing on the issues raised by the petition. In a pre-hearing memorandum and at the hearing Foster's lawyer, with commendable candor and realism, abandoned three of his issues. The abandoned three are: (1) the challenge to the reasonable doubt jury instruction in the guilt phase; (2) the challenge to jury consideration of the felony-murder aggravating circumstance; and (3) the challenge to the jury venire's composition. The remaining issues fall into two categories, one evidentiary issue and strict legal issues, and will be discussed under those headings. I first summarize the bare facts surrounding Foster's conviction to place the various claims in perspective. I will then address each remaining issue.

SUMMARY

There was little doubt from the beginning that early in the morning of July 15, 1975, Foster killed Julian Lanier. Foster and Lanier met the evening before in Tot's Bar where they got acquainted over a few drinks. At Lanier's suggestion Foster agreed to find some women who would hire out for recreational sex. They traveled in Lanier's camper to the Bay Shore Bar where Foster, with Lanier's financial backing, found two women who agreed to their proposition. The foursome drove to a secluded place to party. There the party ended. Foster beat Lanier bloody and then, after talking to him briefly, slit his throat. While Foster and the women were covering Lanier with leaves and branches, Lanier made sounds of life which inspired Foster to slice his cervical spine.

Foster was arrested, given a first appearance, and appointed counsel on July 15, 1975, the day of the murder (P. Ex. 17). Five days later Foster gave a detailed confession to Bay County Sheriff's Office Investigator Joe Coram. A motion to suppress (P. Ex. 11) that statement, submitted on stipulated facts, was denied (P. Ex. 1-D, p. 458). After Foster's counsel filed a Suggestion of Insanity (P. Ex. 14), the court appointed three psychiatrists to examine Foster. The matter of Foster's competency to stand trial was submitted to the court on the basis of the psychiatrists' report (P. Ex. 18). The court found Foster competent to stand trial on September 25, 1975 (P. Ex. 14).

October 1, 1975, through October 4, 1975, Foster was tried by jury. The jury found him guilty and recommended the death

sentence. Judge Spear sentenced Foster to death, and the Florida Supreme Court affirmed the conviction and sentence. **Foster v. State,** 369 So.2d 928 (Fla. 1979). The United States Supreme Court denied Foster's petition for certiorari October 1, 1979. Governor Graham signed Foster's death warrant on May 5, 1981. Foster sought a new trial and sentencing proceeding in Florida courts on May 12, 1981, under Florida Rule of Criminal Procedure 3.850. The court denied his 3.850 motion. The Florida Supreme Court affirmed that denial. **Foster v. State,** Fla. S.Ct. Case No. 60,636 (May 28, 1981). Shortly afterwards, on May 29, 1981, I stayed Foster's execution.

THE EVIDENTIARY ISSUE

One of Foster's habeas corpus issues requires an evidentiary determination. It

is his claim of ineffective assistance of counsel.

Ineffective Representation

Foster alleges six instances of ineffective representation: (1) failure to investigate and raise an insanity defense and to present mitigating psychiatric evidence during the trial's sentencng phase; (2) failure to raise Foster's alleged incompetency at trial; (3) mentioning the parole considerations of a life sentence without requesting an appropriate limiting instruction; (4) failure to request an instruction telling the jury to disregard evidence of Foster's criminal past; (5) failure to object to the questions which elicited the testimony about earlier crimes; (6) failure to challenge the jury venire's composition. This last claim I assume included in

Foster's abandonment of his challenge in this proceeding to the jury venire, particularly since no evidence was presented on the subject. The others will be individually addressed.

The United States Consitution's guarantee of due process includes a guarantee of effective assistance of counsel. **Powell v. Alabama,** 287 U.S. 45 (1932) (recognizing the right in certain capital cases); **Brooks v. Texas,** 381 F.2d 619, 624 (5th Cir. 1967), (footnote omitted), ("An indigent defendant is entitled to the effective assistance of counsel").

> Effective counsel does not mean 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render **and rendering** reasonably effective assistance.' **MacKenna v. Ellis,** 280 F.2d 592, 599 (5th Cir. 1960), **modified,** 289 F.2d 928 (5th Cir. 1961),

> **cert. denied,** 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). This necessarily 'involves an inquiry into the actual performance of counsel in conducting the defense ... based on the totality of the circumstances and the entire record.' **United States v. Gray,** 565 F.2d 881, 887 (5th Cir.), **cert. denied,** 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978).

Beavers v. Balkcom, 636 F.2d 114, 115 (5th Cir. 1981).

The Lawyer's Qualifications

The reasonable likelihood of Foster's lawyer, Virgil Mayo, rendering effective assistance cannot seriously be questioned. In 1975 Virgil Mayo had been a member of the Florida Bar for 24 years. All of that time except for about eight months of 1952 was spent as a practicing lawyer. Mayo had been Public Defender of Florida Fourteenth Judicial Circuit since 1963, the year the legislature created the

position. He had tried hundreds of cases. Although Foster is the only defendant tried for a capital offense Mayo has represented since the current death penalty statute was enacted, he represented several defendants charged under Florida's earlier law. His record is impressive. Two clients got jury verdicts of acquittal. One got a binding jury recommendation of mercy. The fourth's trial ended in a mistrial and was later plea-bargained out as a manslaughter case. Mayo's experience included more than twelve cases involving psychiatric defenses. He also served three years on the Panhandle Mental Health Board.

This recital of Mayo's experience describes only cases in which he was lead counsel. His experience is more extensive. As Public Defender he has served as an advisor and overseer in

hundreds of cases. In addition Mayo was assisted at Foster's trial by a new assistant public defender, Bill Wager. Wager's qualifications and actions during Foster's trial have not been questioned. And I know from having observed Wager in action many times that he is an intelligent dedicated, innovative, highly competent criminal defense attorney. These facts show Foster was represented by experienced, competent counsel.

Investigation of Psychiatric Defenses

Foster's allegations of ineffectiveness, however, focus not upon his lawyer's qualifications but his conduct. Mayo, Foster claims, did not render reasonably effective assistance. Eight specific actions are claimed to show ineffectiveness. One of the most major is the claim that Mayo did not adequately

investigate and present psychiatric defenses for Foster.

Mayo officially took over Foster's case from an assistant on September 10, 1975 (P. Ex. 1-A), although he was aware the case would be his at least a week earlier. Mayo's investigation was thorough. He reviewed the reports of the three appointed psychiatrists. In addition, he reviewed extensive medical records from the Bay County Memorial Hospital (P. Ex. 7), Florida State Hospital (P. Ex. 8), and the Bay County Guidance Clinic (P. Ex. 9). Mayo held at least ten conferences with Foster. His assistant, Wager, met with Foster five additional times. Mayo talked to Foster's mother. To all this Mayo added a valuable personal resource, his long-time residence in the area, his extensive family ties, and his knowledge of Foster.

"An attorney does not provide effective

assistance if he fails to investigate sources of evidence which may be helpful to the defense." **Davis v. Alabama**, 596 F.2d 1214,1217 (5th Cir. 1979). Mayo's primary alleged investigative failing was not obtaining the medical records. The facts show he did. Foster also alleges Mayo did not talk to an important lay witness, his mother. Again the facts show he did. Mayo did not talk with Foster's siblings. Much of their testimony at the hearing revealed Foster's unsavor history of self-mutiliation, rape, alcohol abuse, drug abuse, a fondness of knife fighting, and beating his family members. Mayo was aware of much of this, especially Foster's reputation with a knife, through his community contacts. Most of this information was also in the medical records Mayo reviewed. In short, the facts revealed at the hearing show Mayo's

investigation unearthed almost all of the information Foster claims Mayo failed to investigate. Foster has not proven his claims of ineffective investigation. Mayo's investigation of possible psychiatric defenses was more than adequate.

Presentation of Psychiatric Defenses

Competency to Stand Trial

Before trial Mayo questioned Foster's competency to stand trial. Three court-appointed psychiatrists examined Foster. All three found Foster competent to stand trial (P. Ex. 4-A). Two of the doctors had treated Foster before. One, Dr. Sapoznikoff, had treated Foster three times; once in 1972, once in 1973, and once in 1974. He was well informed about Foster's medical history, including his hospitalization in the Bay County Guidance

Clinic. Mayo allowed the judge to decide Foster's competency upon the basis of those reports. That decision is challenged as ineffective.

Foster argues and his experts testified that Mayo should have asked for a hearing and put the psychiatrists on the stand. Mayo did not ask for a hearing because he felt it would be useless. From his experience he believed that most psychiatrists, included these three all of whom he was familiar with, would not change their opinion once it was down in writing. My 15 years of trial experience cause me to agree with Mayo's evaluation of the situation. Over the years I examined a large number of psychiatrists. Once in a while a psychiatrist might vacillate from a written opinion, but I have never seen one retract an opinion. Mayo's submission of the competency issue was a realistic,

effective decision.

During the trial Foster took the stand. While he began by recounting a version of the murder blaming the women, he ended confessing:

> I believe that she is the one that killed the man because - fuck it, I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.

(P. Ex. 1-D, pp. 510, 511). Immediately after Foster's dramatic confession Mayo moved for a continuance and for additional psychiatric examinations (P. Ex. 1-D, p. 512). The motion was denied (P. Ex. 1-D, p. 516).

During the trial Foster was talking a mild sedative, Valium. His dosage was ten milligrams three times a day. He took the first dose noon the first day of trial and as prescribed afterwards. Mayo was not aware of this at trial, but Foster informed him of it through a letter to Wager shortly after the trial.

Foster argues Mayo ineffectively raised the competency to stand trial issue when Foster confessed. His focus is on Mayo's failure to notice during trial or raise post-trial Foster's use of Valium. One alleged fact Foster relies on I find did not exist. Foster claims he slept through much of the trial. I find he did not, although he may have laid his head on the table momentarily once or twice.

Perhaps Mayo should have filed a motion for new trial alleging incompetence at trial and informing the court of Foster's

Valium use. It would, however, have been a motion destined for denial. Foster had been treated with and seriously abusing must stronger drugs. In fact 30 milligrams a day was the smallest Valium dosage prescribed for Foster in his years of medical treatment. That dosage would have had no effect on Foster, a chronically nervous person, except to relax him a bit. The fact that he had been without Valium at least a month before trial is insignificant. Since Valium is a long-lasting, cumulative drug, his abstinence actually lessened the Valium's effect compared to what it would have been if he had been taking it for some time before the trial. I find Mayo effectively questioned Foster's competency at trial.

The Insanity Defense

Foster claims Mayo's failure to present

an insanity defense was ineffective. The decision to not present the insanity defense was Foster's, not Mayo's. In Mayo's opinion the best defense strategies available were seeking a conviction of the lesser included offense, second degree murder, or pleading not guilty by reason of insanity. He explained his strategies and reasoning to Foster. He particularly favored seeking a second degree conviction. His theory was sound. Second degree murder included

> The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual....

§782.04(2), Fla.Stat. (1975). The maximum punishment was 30 years' imprisonment. §775.082(3)(b), Fla.Stat. (1975). Mayo

believed that with the psychiatric evidence available, some rather bizarre behavior by Foster before and during the murder, and the circumstances (especially the fact that the victim died while drinking and using a prostitute) he could convince the jury to return a second degree verdict.

Foster rejected the defense. He wanted to "walk or burn." Despite his many arrests Foster had never been convicted, and he was convinced he could talk his way out of jail. It will be my word against the womens' was his reasoning. Mayo pointed out the fallacy of Foster's plan. Two eyewitnesses, he said, would be hard to counter, and Foster's confession would be devastating despite Foster's explanation that the women had just convinced him he killed Lanier. Mayo tried many times to change Foster's mind. But Foster was adamant--"Walk or Burn."

Foster rejected an insanity defense for the same reasons. As with the second degree murder strategy, Mayo explained the defense and its consequences. He accurately informed Foster that a not guilty by reason of insanity verdict might lead to some time in a mental hospital. A person acquitted for cause of insanity could be treated as insane and incarcerated "[i]f the discharge or going at large of such . . . person shall be considered by the court manifestly dangerous to the peace and safety of the people . . .." Fla. R. Crim. P. 3.460 (1975). Given Foster's long history of violence and the brutality of the murder it was highly likely that if acquitted by reason of insanity, he would be confined for a good while in a mental hospital. This possibility of confinement caused Foster to reject an insanity defense.

"Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." **Gaines v. Hopper,** 575 F.2d 1147, 1149-50 (5th Cir. 1978). Informed evaluation of potential defenses and a meaningful discussion of the case's realities are what Mayo gave Foster. Foster insisted on not following Mayo's advice. After properly advising Foster and trying to convince him to follow the advice, Mayo had no choice but to honor Foster's wishes and forego the insanity defense and forego seeking a second degree conviction.

Psychiatric Evidence in the Sentencing Phase

Foster's final major challenge to Mayo's effectiveness questions Mayo's performance in the trial's sentencing phase.

Florida's capital punishment statute creates a two-step proceeding. In step one, the guilt phase, the jury determines a defendant's guilt or innocence of the capital felony. If the defendant is convicted of a capital felony, the judge conducts a separate sentencing proceeding, the sentencing phase, to determine whether death should be imposed. §921.141 (1), Fla. Stat. (1975). The proceeding is held before a jury which renders an advisory sentence. Eight aggravating and seven mitigating circumstances must be considered. §§921.141(2), (5), (6), Fla. Stat. (1975). The judge then considers the jury recommendation, weighs the aggravating and mitigating circumstances, and imposes sentence. §921.141(3), Fla. Stat. (1975). "In each case in which the court imposes the death sentence, the determination of the court shall be supported by

specific written findings of fact based upon the circumstances in subsections (6) [sic] [aggravating circumstances] and (7) [sic] [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." §921.141(3), Fla. Stat. (1975). The conviction and death sentence are automatically reviewed by the Florida Supreme Court. §921.141(4), Fla. Stat. (1975).

> Upon an appeal from the judgement by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not.

Fla. R. App. P. 6.16(b) (1975). **See** Boyd and Logue, **Developments in the Application of Florida's Capital Pelony Sentencing Law,** 34 U. Miami L. Rev. 441 (1980), for a thorough review of Florida's death sentence statute.

Foster thinks Mayo was ineffective in the sentencing phase because he did not adequately present two mitigating circumstances: (1) "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance", section 921.141(6)(b), Florida Statutes (1975), and (2) "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired", section 921.141(6)(f), Florida Statutes (1975).

Mayo presented evidence relevant to these factors. He specifically focused upon only one factor, extreme mental or emotional disturbance. He felt the psychiatric mitigating circumstances would be difficult for an unsophisticated Bay County jury to understand and likely to be ignored as technicalities by a jury

outraged by the murder's brutality. Consequently he focused upon seeking mercy. To that end he put Foster's ex-wife on the stand. He felt she would evoke the jury's sympathy while presenting evidence from which he could also argue the psychiatric mitigating factors. She testified about Foster's self-mutilation and suicidal urges and the apparent lack of reason for his actions. Her testimony, albeit on cross-examination, was moving.

> He is a very sick person and I have begged for help for him and so has his mother and we could not get any help from nobody. They would rather put him in the electric chair and kill him than send him to an institution where he can get help. He has been to the mental health unit on a whole lot of occasions and they let him out and they give him pills to calm his nerves and the Judge won't do anything. He promised that he would. I have talked to Dr. Mason and he promised he would and I talked to Dr.

> Cluxton and he promised he would. And Everybody at the Bay County Sheriff's Department knows me and any time I have every had any occasion to talk to any of them, asking them to do something for him and nobody will. And they still won't because it's much easier to just go ahead and electrocute him and get it over with so they don't have to worry about somebody whose mind is bad. If he had T.B. or anything they would put him in an institution and they would help him where he couldn't hurt anybody but just because his mind is bad people don't understand that. They think it's all right just to go ahead and get him out of society. But why didn't they get him out of society before a crime like this had to be committed.

(P. Ex. 1-E, pp. 625-626).

Mayo also put Dr. Mason, one of the examining psychiatrists, on the stand. Through Mason the jury learned Foster had received psychiatric treatment four times since 1968, that he had been diagnosed paranoid, and was suicidally depressed.

Records of a 1970 proceeding to determine Foster's competency were also introduced.

From the evidence introduced Mayo argued for a life recommendation. His argument actually began during voir dire where he asked several jurors whether they would consider mental or emotional disturbance as a mitigating factor in sentencing (P. Ex. 1-B, pp. 131, 133-135, 149). One prospective juror spontaneously mentioned mental disorders during voir dire (P. Ex. 1-B, p. 175). This indicates all the jurors, not just the ones questioned, realized a mental or emotional disturbance was important in sentencing. In any event the jury which unanimously recommended Foster's death included five jurors Mayo had questioned on the subject (P. Ex. 1-B, pp. 133-135; P. Ex. 1-E, pp. 653-654). During voir dire Mayo also emphasized mercy to the jury (P. Ex. 1-B, pp. 130, 132-136,

149-151, 163, 174, 182, 186, 195). The jury was instructed upon all mitigating circumstances (P. Ex. 1-E, pp. 648-649).

Building upon voir dire, the evidence, and the instructions Mayo argued for mercy emphasizing the mental or emotional disturbance mitigating factor as a reason to recommend life (P. Ex. 1-E, pp. 636-639). His use of Foster's ex-wife's testimony was particularly persuasive. He argued:

> You know, I would like to almost join that girl that was on that stand in crying out; in crying out as much money as we spend. And it's a shame that I live in a society that thousands and thousands and literally millions of dollars that are spent that we don't - that we don't know much about the mind. You know the reasons that officials haven't done anything I guess, we are treating minds about like the Indians treated boils with some wet moss. We are not even to the stage of treating the mind to where we can lance a boil, much less have penicillin. We know less

about the mind than anything else. Yet in our ignorant society the State askes [sic] you to kill a person.

That little girl cried out. She cried out if you are sick with tuberculosis, if you are sick with tuberculosis we treat it and we do. In my generation we have learned how to treat this. And I don't believe that forever we will continue to treat the mind by putting wet moss on it. I think that we are on the threshold of teating the human mind. And I think the reason for twenty-five years of holding a person in this thing with somebody that was compassionate and somebody says well during this period of time, you know, laws could be amended but if we are going to keep them there and I am asking for the life. I am asking for each of you to recommend to this Court that this life be saved because mitigating and extenuating circumstances exist.

(P. Ex. 1-E, pp. 638-639).

A lawyer's effectiveness is evaluated "on the totality of the circumstances and the entire record." **United States v. Gray,**

565 F.2d 881 (5th Cir. 1978), **cert. denied,** 435 U.S. 955, 55 L.Ed.2d 807 (1978). In Foster's case the totality of the circumstances included a new statute. Florida's death penalty law was enacted in 1972. Ch. 72-724, §9, Laws of Fla. When Mayo tried the case there were only ten Florida Supreme Court opinions interpreting the death penalty law. **Alvord v. State,** 322 So.2d 533 (Fla. 1975); **Swan v. State,** 322 So.2d 485 (Fla. 1975); **Slater v. State,** 316 So.2d 539 (Fla. 1975); **Proffitt v. State,** 315 So.2d 461 (Fla. 1975); **Sawyer v. State,** 313 So.2d 680 (Fla. 1975); **Gardner v. State,** 313 So.2d 675 (Fla. 1975); **Spinkellink v. State,** 313 So.2d 666 (Fla. 1975); **Taylor v. State,** 294 So.2d 648 (Fla. 1974); **Lee v. State,** 294 So.2d 305 (Fla. 1974); **State v. Dixon,** 283 So.2d 1 (Fla. 1973). None of them interpreted the mitigating circumstances. One thing was

clear. Jury recommendations of life were very important. **See, Swan v. State,** 322 So.2d 485 (Fla. 1975); **Taylor v. State,** 294 So.2d 648 (Fla. 1974). Supreme Court review was in light of the facts, and the

jury found the facts. **Alvord v. State,** 322 So.2d 533 (Fla. 1975).

Important evidentiary considerations were also involved. If Mayo introduced Foster's medical history and testimony of his relatives as Foster says he should have, a great deal of highly prejudicial evidence would have come along. The jury would have learned that Foster once took his mother's car from her at knifepoint; that he raped two women, one of whom was his sister-in-law; that he had been arrested a number of times for violent crimes; and that he once told his mother he was going to kill his little brother and

cook him for supper.

In light of the law, or lack of it, and the evidence available, Mayo's decision to try talking the jury into a life sentence through use of emotional testimony, psychiatric testimony, and a good old-fashioned appeal to mercy was reasonable. After considering Mayo's handling of the sentencing phase, I cannot conclude it was ineffective. Another lawyer may have done it differently. Another lawyer may have done it better. Another lawyer may have done it worse. But Mayo was not ineffective.

Parole Considerations

From voir dire through closing argument Mayo emphasized to the jury that a life recommendation would mean at least 25 years' imprisonment without parole for Foster. This should not have been done,

Foster claims, without a limiting instruction telling the jury that 25 years was the minimum time he would serve. Mentioning parole without a limiting instruction, according to Foster, invited the jury to recommend death in order to prevent him mistakenly being paroled later. However, "[a]dmittedly, Petitioner's [Foster's] former counsel [Mayo] may well have brought the issue of parole before the jury in order to impress upon the jury the severity of a life sentence in Florida . . .." Petitioner's Prehearing Memorandum of Law, Doc. No. 18, p. 18, **Foster v. Strickland**, TCA 81-0847 (U.S.D.Ct. N.D. Fla. June 12, 1981). More plainly put, Mayo's reference to 25 years without parole would discourage the jury from recommending death to avoid early parole. The strategy was well chosen. It may have been better implemented with the addition of a limiting

instruction. But it is effective counsel, not perfect counsel Foster is entitled to, and the strategy, as implemented, was effective.

References to Foster's Criminal Record

This issue has two parts. One is Mayo's failure to object to cross-examination questions eliciting testimony about Foster cutting one person and knifing his father and then leaving him in a ditch. The second is Mayo's failure to request a limiting instruction telling the jury to disregard references to Foster's criminal record. Under the existing law Mayo would have been justified in thinking the evidence was admissible. The statute provided for consideration of "any matter that the court deems relevant to sentence" and admission of any "evidence which the court deems to have probative value . . .

regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." §921.141(1), Fla. Stat. (1975). Just two weeks before Foster's trial the supreme court interpreted section 921.141(1) broadly.

> There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence.

Alvord v. State, 322 So.2d 533, 539 (Fla. 1975).

Again, ideally Mayo should have objected to the questions and asked for a limiting instruction. But his failure to do so does not amount to ineffectiveness. This claim highlights the "Catch 22" nature of the ineffectiveness claims. The

evidence Foster says Mayo should have objected to is included in the medical records and family member testimony Foster says Mayo should have introduced.

THE NON-EVIDENTIARY ISSUES

The remaining issues raised in Foster's petition may be disposed of as a matter of law. Each will be addressed.

Incompetency at Trial

Foster's position on his incompetency at trial was summarized in the evaluation of his ineffective assistance of counsel claim. Review of the state trial court's determination that Foster was competent to stand trial is foreclosed by **Wainwright v. Sykes,** 433 U.S. 72, 53 L.Ed.2d 594 (1977). That decision forbids federal review of a state court decision based upon independent state grounds. Here the independent state ground foreclosing review

is abandonment on appeal. Mayo raised and preserved the issue of Foster's competency at trial. The issue was not raised in his appeal to the Florida Supreme Court and was therefore abandoned, as it should have been. Appellant's Initial Brief, **Foster v. State,** Fla. S. Ct. Case No. 40,380 (filed May 7, 1976) (hereinafter cited App. Int. B.).

Admissibility of Foster's Confession

Foster claims his confession was obtained through violating his right to counsel and should not have been admitted. The issue was raised at trial on stipulated facts and abandoned, as it should have been, on appeal. App. Int. B. **Wainwright v. Sykes, supra,** forecloses review. In addition the factual findings implicit in the trial judge's ruling, which under Title 28, United States Code, Section

2254(d), are binding on me, support denying the motion because Foster initiated the statement. **Edwards v. Arizona,** U.S._____ (U.S.S.Ct. May 18, 1981).

Evidence Constitutionally
Insufficient to Prove Robbery

The record supports the state court's factual determination that Foster committed robbery. **See, Foster v. State,** 369 So.2d 928 (Fla. 1979).

Impartial Jury Denied by
Exclusion of Juror Smith

The trial court removed Joe Smith from the jury panel because of his objections to the death penalty. Smith said he would never vote for a death sentence or for guilt if the conviction could result in a death sentence (P. Ex. 1-B, pp. 23-25). His statements amounted to "compelling prejudice against the death penalty" or near "resolve to vote against it blindly

and in all circumstances" which constitutionally justify a court excluding a juror. **Burns v. Estelle,** 592 F.2d 1297 (5th Cir. 1979).

Trial Court Mishandling
Evidence in Penalty Phase

This argument challenges the admission during the sentencing phase of graphic pictures of the deceased and the court not instructing the jury, on its own motion, to disregard references to Foster's criminal record. The contention is meritless.

"Heinous, Atrocious, and
Cruel" Jury Instruction

One aggravating circumstance set forth in Florida' death penalty law and used to justify Foster's death sentence is "[t]he capital felony was especially heinous, atrocious, or cruel." §921.141(5)(h), Fla. Stat. (1975). This provision was part of Florida's statute when the United States

Supreme Court considered and approved it in **Proffitt v. Florida,** 428 U.S. 242, 49 L.Ed.2d 913 (1976). Foster claims it is unconstitutionally vague. **Proffitt** mandates rejection of this claim.

Mitigating Circumstances Jury Charge

Foster's jury was told:

> Should you find one or more of these aggravating circumstances to exist it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

(p. Ex. 1-E, p. 648). The statutory mitigating factors were listed next. Then the judge instructed:

> If one or more aggravating circumstances are established you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in

> reaching your conclusions as to the sentence which should be imposed.

(P. Ex. 1-E, p. 650).

Foster argues these instructions are impermissible under the holding in **Lockett v. Ohio,** 438 U.S. 586, 604, 57 L.Ed.2d 973, 990 (1978) (footnotes omitted), that "the sentencer, as in all but the rarest kind of capital case, [must] not be precluded from considering **as a mitigating factor,** any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". This issue was not raised at trial, and is, therefore, barred by **Wainwright v. Sykes, supra,.** Also, Florida's law is not like Ohio's, which required a death sentence unless one of three circumstances were proven.

Florida's law allows the sentencer to consider and weigh mitigating circumstances as it sees fit.

Findings of Fact by Jury and
Judge Justifying Death Sentence

Foster argues that the Constitution requires written findings from judge and jury specifying the mitigating and aggravating circumstanes found and considered. Foster was sentenced to death in a procedure approved by the Supreme Court. **Proffitt v. Florida, supra.** Also, **Wainwright v. Sykes, supra,** bars this claim since it was not raised at trial.

Florida Supreme Court's
Review of Post-Sentencing
Psychiatric and Investigative Reports

Foster has alleged the Florida Supreme Court secretly obtained and reviewed psychiatric and/or investigative reports concerning him during its consideration of his appeal. He was one of several

prisoners who petitioned the Florida Supreme Court for relief on that ground. The court held a claim for relief had not been stated because its function as a reviewer rather than sentencer made its consideration of such documents irrelevant. **Brown v. Wainwright,** 392 So.2d 1327 (Fla. 1981). A petition for certiorari is pending before the United States Supreme Court. **Brown v. Wainwright, cert. pending,** U.S.S.Ct. No. 80,6434 (April 3, 1981). I adopt the reasoning of the Florida Supreme Court and hold Foster's allegations do not state a claim for relief.

Florida's Death Penalty is Applied in an Arbitrary and Unconstitutional Manner

This contention merely argues that all the other alleged errors make Foster's death sentence irrational and arbitrary. It is meritless.

SOME FINAL MATTERS

Foster's Counsel

At some point Foster may decide to challenge the effectiveness of his counsel in this proceeding, Richard H. Burr, III. In anticipation of that possibility, I record my observations on Burr's effectiveness. Burr has done a good job. His pleadings have been well written and thorough. The memo he filed was well researched, well written, and quite helpful. Burr clearly took pains to present the law accurately and forthrightly abandoned claims he found unsupportable. In court he was an effective examiner and a gentlemen. This decision simply applies the law to the facts. It is no reflection upon his abilities.

Delay

In argument on the Motion for Stay the State complained vociferously of Foster's alleged delay in bringing this petition. Rule 9(a) of the Rules Governing Section §2254 Cases in the United States District Court provides for dismissal of delayed petitioner. The State never moved for dismissal under this rule. If its complaints were well founded, a motion should have been made. If the complaints were not well founded, they should not have been made. The comments made at the hearing insinuated Burr or Foster deliberately waited as long as possible to file the petition in order to delay Foster's execution. Such charges about Burr are insults to a capable lawyer, obviously working with a handful of other lawyers to represent the hundreds of people sentenced to death, probably at great

personal sacrifice. Such charges about Foster are ludicrous. To imagine a semi-literate indigent plotting his federal litigation strategy is hard. Blame for the delay in this case is more fairly placed upon the Florida Supreme Court which took two years and five months to decide Foster's appeal and the State of Florida which does not provide indigents sentenced to death lawyers for their collateral litigation.

JUDGEMENT

Foster's Petition for Habeas Corpus is denied. The stay in this case is vacated.

DONE AND ORDERED this 2nd day of July, 1981.

/s/
LYNN C. HIGBY
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF FLORIDA

No. 60,636

Charles Kenneth Foster, Appellant,

v.

State of Florida, Appellee.

[May 28, 1981]

Adkins, J.

This is an appeal from an order denying Charles Kenneth Foster' motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Appellant requested an evidentiary hearing on his motion and a stay of execution pending disposition thereof. The trial judge denied the motion for post-conviction relief without an evidentiary hearing and denied the application for stay of

execution. Foster has also filed a motion for stay of execution in this Court.

After reviewing the record and hearing oral argument, we deny the motion for stay of execution and affirm the order of the trial judge denying the motion for post-conviction relief without an evidentiary hearing.

The appellant was convicted of murder in the first degree and robbery on October 4, 1975, and sentenced to death upon the conviction for murder in the first degree. He was also sentenced to life imprisonment upon conviction for robbery. Upon appeal, this Court affirmed both of appellant's convictions and sentences on February 22, 1979, and denied rehearing on May 10, 1979. **Foster v. State**, 369 So.2d 928 (Fla. 1979). On October 1, 1979, appellant's petition for certiorari was denied by the Supreme Court of the United

States. On May 5, 1981, the governor of the state of Florida signed a death warrant for appellant requiring his execution on June 3, 1981. On May 12, 1981, the motion for post-conviction relief was filed in the trial court.

Appellant has argued that there are two issues which require evidentiary hearing: the ineffective assistance of counsel and the claim that appellant was incompetent during the course of the trial. Appellant says that counsel was ineffective in that he failed to investigate medical records which were readily available and failed to investigate the existence of expert witnesses who could testify as to appellant's mental incompetency. Appellant also argued that his attorney advised him improperly about the consequences of a plea of not guilty by reason of insanity in that his counsel advised him that he would spend

the rest of his life in the "nuthouse" if this defense should prevail. Appellant also argues that his counsel should have noticed the incompetency of the appellant at the trial. He alleges that he was taking a prescription drug, valium, during the trial and this drug made him incompetent. Appellant also argues that he was, in fact, incompetent during the trial and this was an additional reason for an evidentiary hearing.

Even though it may appear, upon an examination, that a motion for post-conviction relief is sufficient, it should be summarily denied if the files and records in the case conclusively refute the allegations or otherwise conclusively preclude relief. **Lawson v. State**, 231 So.2d 205 (Fla. 1970); **State v. Reynolds**, 238 So.2d 598 (Fla. 1970).

It appears from the fact of the motion that the matters relating to the competency of the appellant did not constitute relevant evidence of insanity which could be introduced during the guilt phase of the trial. This evidence would not require the submission of the insanity issue to the jury. **See Grissom v. State**, 237 So.2d 57 (Fla. 3d DCA 1970); **Campbell v. State**, 227 So.2d 873 (Fla. 1969); **Dampier v. State**, 180 So.2d 183 (Fla. 1st DCA 1965). The trial judge found appellant competent to stand trial and observed his conduct during the trial. The record conclusively shows that this assertion of incompetency during the trial is without merit.

The record discloses the following dialogue out of the presence of the jury when appellant was called as a witness:

BY MR. MAYO:

Q. Your name is Charles

Kenneth Foster?

A. Yes sir.

Q. Are you commonly called Kenny?

A. Yes sir.

Q. Kenny, we are out of the presence of the jury and I have discussed this aspect with you, is that correct?

A. Yes sir.

Q. Prior to this time have you been advised that the three psychiatrists and the Court has ruled that you are presently competent to stand trial and that you are competent to aid in the preparation of your defense?

A. Yes sir.

Q. Is it true that both counsel that are present in the Court have discussed many times with you your various defenses?

A. Yes sir.

Q. And did we also discus with you the possibility of the defense of insanity at the time of the crime, not presently, but at the time of the crime?

A. Yes sir.

Q. Did you direct us to prepare a defense other than that?

A. Yes, I did.

Q. Did we also discuss with you the possibility of a defense in which we would attempt to reduce the degree of the offense to second degree?

A. Yes sir.

Q. Did you advise your counsel to prepare a defense other than that?

A. Yes, I did.

Q. Is it your desire to take the stand in the presence of the jury and give your version of the alleged offense?

Appellant, during his subsequent testimony, confessed his guilt from the witness stand. At that moment his counsel requested a recess and requested the court to determine the sanity or competency of

the appellant at that time as well as his sanity at the time of the murder.

During the penalty phase counsel effectively introduced evidence of appellant's past psychiatric treatment through the testimony of his wife. One psychiatrist was called, but appellant now complains that the interrogation of the psychiatrist was faulty. Appellant says counsel should have focused the examination toward a psychiatric evaluation by the doctor. This was a matter of judgment, and we cannot fault the attorney for presenting evidence in "lay language" through the wife's testimony instead of "doctor language" through the doctor's testimony.

Defense counsel, during the penalty phase, introduced into evidence the written report of Committee Finding Incompetency and a petition for involuntary hospitalization and hospitalization certificate

containing a diagnosis in each instance. By following this tactic, the attorney gave the jury the opportunity of reading a written exhibit instead of attempting to remember technical oral testimony.

The trial court properly instructed the jury that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" was a mitigating factor. Also, before sentencing appellant, the trial judge considered three psychiatric reports which had been prepared on the question of appellant's comptency to stand trial. Appellant's counsel, in closing argument, stressed this mitigating factor. In our opinion he handled this problem as a professional advocate and should not be faulted.

A conviction is presumed to be valid. Therefore, when ineffective assistance of counsel is asserted, the burden is on the person seeking collateral relief to specifically allege and establish the grounds for relief and to establish whether these grounds resulted in prejudice to that person. **Meeks v. State**, 382 So.2d 673, 675 (Fla. 1980). The appellant has failed to carry this burden.

Applying the standards set forth in **Knight v. State of Florida**, 394 So.2d 997 (Fla. 1981), we find that the trial attorney has provided reasonably effective assistance of counsel to Foster.

Appellant claims that the motion for post-conviction relief should be granted because this Court allegedly reviewed material, in connection with the appeal, which was unknown to appellant. This is not a ground which is contemplated as

proper for post-conviction motion. Florida Rule of Criminal Procedure 3.850 authorizes the use of this procedure by a prisoner claiming the right to be released on the ground that the judgment was entered or that sentence was imposed in violation of the constitution or laws of the United States or of the state of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack. In other words, the motion to vacate under Florida Rule of Criminal Procedure 3.850 must be directed to the judgment and sentence of the trial court. Under no interpretation of this rule can any action of the Florida Supreme Court be reviewed. Furthermore, treating the claim

as a petition for writ of habeas corpus, this issue was settled in **Brown v. Wainwright**, No. 59,732 (Fla. Jan. 15, 1981).

The appellant has presented other issues which were raised on direct appeal, or could have been raised on direct appeal. It is well settled that issues raised and disposed of on direct appeal, as well as those issues which could have and should have been raised on direct appeal, are not the proper subject matter for a post-conviction motion. **Witt v. State**, 387 So.2d 922 (Fla.) **cert. denied**, 101 S.Ct. 796 (U.S. 1980); **Spinkellink v. State**, 350 So.2d 85 (Fla. 1977); **State v. Matera**, 266 So.2d 661 (Fla. 1972).

We therefore affirm the order of the trial judge denying the motion for post-conviction relief and deny appellant's motion for stay of execution.

No petition for rehearing will be entertained.

It is so ordered.

SUNDBERG, C.J., BOYD, OVERTON and ALDERMAN, JJ., Concur
McDONALD, J., Dissents with an opinion
ENGLAND, J., Dissents

McDONALD, J. dissenting.

I would grant a stay of execution and direct the trial judge to afford the defendant an opportunity to present evidence that the jury and the trial judge were insufficiently apprised of the "mental mitigating factors" set forth in section 921.141(6).*

In **Dixon v. State**, 283 So.2d 1, 10 (Fla. 1973), we stated that

---

* The legislature has provided three "mental mitigating factors" in § 921.141(6).

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

> [m]ental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

This distinction is fine, but one goes to the guilt while the other may affect the sentence. While I am satisfied that the record clearly demonstrates that there was no error in the handling of the guilt phase of Foster's trial, when it comes to the sentencing phase, the picture becomes sufficiently blurred to require an evidentiary hearing under the formula set forth in **Meeks v. State** 382 So.2d 673 (Fla. 1980), as modified by **Knight v. State**, 394 So.2d 997 (Fla. 1981).

An Appeal from the Circuit Court in and for Bay County,

Larry A. Bodiford, Judge-Case No. 75-486-CF

Richard H. Burr, III, Nashville, Tennessee; and Stephen L. Seliger, Florida Clearinghouse on Criminal Justice, Tallahassee, Florida,

for Appellant

Jim Smith, Attorney General, and Gregory C. Smith, Assistant Attorney General, Tallahassee, Florida,

for Appellee

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 1, 1979

Richard W. Prospect, Esq.
Department of Legal Affairs
The Capitol
Tallahassee, FL 32301

RE: Charles Kenneth Foster
v. Florida
No. 79-5169

Dear Mr. Prospect:

The Court today entered the following order in the above-styled case:

The petition for a writ of certiorari is denied. Mr. Justice Brennan and Mr. Justice Marshall, dissenting: Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231 (1976), we would grant certiorari

and vacate the death sentence in this case.

Very truly yours,

Michael Rodak, Jr., Clerk

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1979

CHARLES KENNETH FOSTER,	:	
Appellant,	:	
v.	:	
STATE OF FLORIDA,	:	CASE NO. 48,380
Appellee	:	
	:	Circuit Court Case No. 75-486

Opinion filed February 22, 1979

An Appeal from the Circuit Court in and for Bay County, Mercer P. Spear, Judge

Luis G. Carres, Assistant Public Defender, Tallahassee, Florida, for Appellant

Jim Smith, Attorney General; and Richard W. Prospect, Assistant Attorney General, Tallahassee, Florida, for Appellee

ADKINS, J.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the

first degree and a sentence of death. He was also adjudged guilty of robbery and sentenced to life imprisonment.

Anita Rogers, 20 years of age, and Gail Evans, 18 years of age, met defendant and the victim, Julian Lanier, at a bar. They knew defendant, but the victim was a stranger.

The girls, after a discussion, agreed to go to the beach or somewhere else to drink and party with the men. The victim bought whiskey and cigarettes, after which the four of them left in the victim's Winnebago camper. The victim was quite intoxicated and surrendered the driving chore to Gail. The defendant and the girls had planned for Gail to have sex with the victim and make some money. Gail parked the vehicle in a desserted area and, after some conversation concerning compensation, the victim and Gail began to disrobe.

Defendant suddenly began hitting the victim and accusing him of taking advantage of his sister. Defendant then held a knife to the victim's throat and cut his neck, causing it to bleed profusely. They dragged the victim from the trailer into the bushes where they laid him face down and covered him with pine branches and leaves. They could hear the victim breathing so defendant took a knife and cut the victim's spine.

The girls and defendant drove off in the Winnebago and found the victim's wallet underneath a mattress. The defendant and the girls split the money found in the wallet and left the vehicle parked in the parking lot of a motel.

The next morning Anita Rogers went to the Sheriff's Department and reported what had happened. She had been committed to a mental institution when she was 13 years of

age and was not charged with any offense in this case.

Defendant was charged by an indictment with the offenses of first-degree murder and robbery.

The defendant testified and, during his description of the events of the evening, testified as follows:

> I reckon I'll just cop out. I have done it, killed him deader than hell. I ain't going to set up here, I am under oath and I ain't going to tell no fucking lies. I will ask the Court to excuse my language. I am the one that done it. They didn't have a damn thing to do with it. It was premeditated and I intended to kill him. I would have killed him if he hadn't had no money and I know I never told you about it, but I killed him.

The jury returned verdicts finding defendant guilty of robbery, premeditated murder in the first degree, and felony murder. After the sentence hearing, the

jury returned an advisory verdict unanimously recommending that defendant receive the death penalty. The court then proceeded to sentence defendant to death on the murder charge and to life imprisonment on the robbery charge.

Defendant says error was committed when the trial court excused certain prospective jurors because of their conscientious objection to the death penalty, relying upon the following principle enunciated in **Witherspoon v. Illinois**, 391 U.S. 510, 521-23 (1968):

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed concientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

The decisions of this Court have been in accord with the holding in the **Witherspoon** case, **supra. See Campbell v. State,** 227 So.2d 873 (Fla. 1969); **Paramore v. State,** 229 So.2d 855 (Fla. 1969).

A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death is not qualified as a juror in a capital case. Section 913.13, Florida Statutes (1975).

The voir dire examination discloses that Joe C. Smith could not and would not return a verdict of guilty if the penalty might result in death. A similar situation existed as to prospective juror John Douglas Hunt. The prospective juror Deloris Swearington was not as adamant as the others, but she was challenged peremptorily and not for cause. Only two jurors were challenged for cause over

objections of defendant because of their beliefs against the death penalty. Similar objections were found to be without merit in **Campbell v. State, supra; Williams v. State,** 228 So.2d 377 (Fla. 1969); **Perkins v. State,** 228 So.2d 382 (Fla. 1969); **Paramore v. State, supra;** and **Portee v. State,** 253 So.2d 866 (Fla. 1971). The lower court did not commit reversible error in allowing the removal for cause of these prospective jurors. We might add that the defendant, in his testimony, made the following statements:

> Well, if the judge will accept my plea of guilty and guarantee I will be electrocuted for taking this man's life, that's what I want. I got this robbery charge, you know, we didn't rob that man.
>
> Anybody knows you can't take nobody's life and that's why I want to die for it. I mean I ain't crazy. I don't know if I got demons in me or not, but I believe I do. I

> went to church Sunday night to get them taken out. [Emphasis added.]

Defendant also complains that gruesome AND inflammatory photographs were admitted into evidence, saying that they were unduly prejudicial. Defendant argues that there was no question as to the identity of the victim of the cause and manner of his death, so the photographs served no evidentiary purpose.

The photographs were indeed gruesome and offensive. However, they met the guidelines set by this Court in **Bauldree v. State**, 284 So.2d 196, 197 (FLa. 1973):

> In State v. Wright, 265 So.2d 361 (Fla. 1972), we commented on and stated the proper test as follows:
>
> ". . . Appellant interprets the **Young** case [Young v. State, 234 So.2d 341 (Fla. 1970)] as holding that 'necessity' rather than 'relevancy' is the test for admissibility of gruesome

photographs. 'Necessity' may be a consideration where, as in **Young**, large numbers of cumulative photographs of a gruesome nature taken away from the scene of the crime, are offered into evidence. But relevancy remains the basic test, as stated in **Young**: [5.Id at 347]

' The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs, particularly in large numbers must have same [sic] relevancy, either independently or as corroborative of other evidence.'

" Thus, the current position of this Court is that allegedly gruesome and inflammatory photographs are admissible into evidence if relevant to any issue required to be proven in a case. Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of 'whether cumula-tive,' or 'whether photo-graphed away from the scene,' are routine

> issues basic to a determination of relevancy, and not issues arising from any 'exceptional nature' of the proffered evidence."

A defendant cannot, by stipulating as to the identity of a victim and the cause of death, relieve the State of its burden of proof beyond a reasonable doubt.

One photograph was introduced during the penalty phase of the proceeding to show that the death blow was delivered with such tremendous impact that it went through the victim's spinal column and severed the victim's spinal cord. This was evidence of the atrocious manner in which the victim was murdered and the deliberate, cold-blooded intent of the defendant.

Defendant contends that the death penalty statute is unconstitutional. He recognizes that the statute was upheld in **State v. Dixon**, 283 So.2d 1 (Fla. 1973),

and **Alford v. State**, 307 So.2d 433 (Fla. 1975), but requests that we reexamine our prior decision. He argues that the statute does not meet constitutional muster because of the discretion of the state attorney in making the charge, as well as the discretion of the state attorney to plea bargain. He also refers to the discretion of the jury to convict a defendant of a homicide less than capital and thereby spare defendant's life. He also refers to the discretion involved in grants of executive clemency. All of these objections have been considered by this Court, as well as the Supreme Court of the United States. The Florida death penalty statute is constitutional. **Proffitt v. Florida**, 428 U.S. 242 (1976).

At the sentence hearing the defendant produced Dr. John F. Mason, a psychiatrist, who testified as to the mental and

emotional condition of the defendant. The defendant also produced his former wife who testified concerning the mental and emotional instability of the defendant. The jury recommended that the death sentence be imposed. The trial judge found that the murder was committed while defendant was engaged in the commission of a robbery and that the capital felony was especially heinous and atrocious. He found that sufficient aggravating circumstances existed as enumerated in Section 921.141(5), Florida Statutes (1975), that justified a sentence of death. He found that there were no mitigating circumstances to out-weigh the aggravating circumstances. There was no presentence report filed in the case or considered by the trial judge.

Defendant contends that the felony was committed while the defendant was under the

influence of extreme mental or emotional disturbance and the trial court did not consider this mitigating factor. The following instruction was given to the jury before they deliberated upon the penalty:

> If one or more aggravating circumstances are established you should consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your con-clusions as to the sentence which should be imposed.

Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar) and found that there were no mitigating circumstances sufficient to overcome the heinous nature of the homicide. The defendant committed the homicide in an effort to fulfill his intentions and complete his desire, i.e., "ripping the victim off." An elderly gentleman agreed

to go out and have some fun, but the price of such activity was his life. Defendant showed no compassion when he cut the victim's throat, beat him, dragged him into the woods, and cut his spine with a knife. As described by one witness, there was no air coming from the body of the victim after she heard "the cracking" of the spine.

The aggravating circumstances were proved beyond a reasonable doubt. As stated in **State v. Dixon**, 283 So.2d at 9,

> When one or more of the aggravatig circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.State. §921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

In **Sullivan v. State**, 303 So.2d 632 (Fla. 1974), the sentence of death was

appropriate where defendant and an accomplice conducted an assistance manager of a restaurant to a swampy area, fully intending to murder such victim, and where the 25-year-old defendant with no prior criminal record shot the victim with both barrels of a shotgun to the back of the head.

The death sentence was appropriate when a murder was committed while the defendant was engaged in the burglary of the deceased's home. This murder was found to be especially heinous, atrocious, and cruel, and the jury recommended the death penalty. The defendant had been previously convicted of burglary (this differs from defendant Foster), but the atrocious nature of the crime coupled with the burglary were other aggravating circumstances sufficient to warrant the death penalty. **Proffitt v. State**, 315 So.2d 461

(Fla. 1975), **aff'd**, 428 U.S. 242 (1976).

Where defendant had a lengthy history of violence (just as defendant Foster), had demonstrated callous indifference to human life, and where his acts were for pecuniary gain, the death penalty was properly imposed. **Henry v. State**, 328 So.2d 430 (Fla. 1976).

Although the findings of the trial judge in the case **sub judice** were not expansive, the justification of his sentence of death in writing was sufficient to show that the sentence of death resulted from reasoned judgment. This reasoned judgment comports with our consideration of other cases and the sentence of death was appropriate under the circumstances.

Other questions raised by defendant have been considered and are without merit.

The judgments and sentences of the trial court are affirmed.

It is so ordered.

ENGLAND, C.M., BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., Concur

IN THE CIRCUIT COURT,
FOURTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA. IN
AND FOR BAY COUNTY

CASE NO. 75-486

STATE OF FLORIDA,

Plaintiff,

vs.

CHARLES KENNETH FOSTER,

Defendant.

SENTENCE

You, CHARLES KENNETH FOSTER, having had a fair trial by jury of your Countrymen, and having been found guilty of the Crime of Murder in the First Degree, of JULIAN FRANKLIN LANIER, the Court now adjudges you to be so guilty. What have you to say why the sentence of the law should not be pronounced upon you?

Saying nothing to preclude such sentence

IT IS THEREUPON the judgment of this Court and the sentence of the law, that you, CHARLES KENNETH FOSTER for the crime for which you have been and stand convicted, be delivered by the Sheriff of Bay County, Florida, to the proper Officer of the State Prison of the State of Florida and be by him safely kept until such day and time as the Governor by his Warrant may appoint, at which time, as by said Warrant directed, and within the walls of the permanent death Chamber provided by law, you, CHARLES KENNETH FOSTER, be by the proper Officer of said Prison, electrocuted until you be dead; and may God have Mercy on your soul.

DONE, ORDERED AND ADJUDGED in Open Court at Panama City, Bay County, Florida, this 4th day of October, 1975.

C I R C U I T J U D G E

CIRCUIT COURT MINUTE BOOK "51" 407

OCTOBER 4, 1975

STATE OF FLORIDA COUNT I: MURDER IN THE FIRST DEGREE

vs. COUNT II: ROBBERY

CHARLES KENNETH FOSTER

G-1010 75-486-CF

JUDGMENT AND SENTENCE

AS TO COUNT II: ROBBERY:

Defendant, being accompanied by counsel, Honorable Virgil Q. Mayo, Public Defender, was asked by the Court whether he had anything to say as to why the judgment of the Court and the sentence of the law should not now be pronounced upon him. He,

saying nothing in bar or in preclusion thereof, heard the Court pronounce the following judgment and sentence:

"You, Charles Kenneth Foster, having been convicted by a jury for the crime of Robbery, the Court adjudges you to be guilty. It is the judgment of the Court and the sentence of the law that you, Charles Kenneth Foster, for your said offense, be committed to the custody of the Division of Corrections of the State of Florida for the rest of your natural life. You are to be given credit on this sentence for 81 days jail time served in the County Jail of Bay County, Florida."

Defendant was advised of his right to appeal this judgment and sentence.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

RECEIVED
JUN 11 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 87 - 1701

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

RICHARD L. DUGGER,

Petitioner,

- v -

CHARLES KENNETH FOSTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

JULIUS L. CHAMBERS
RICHARD H. BURR III
99 Hudson Street, 16th. Fl.
New York, New York 10013
(212) 219-1900

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No. 87 - 1701

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

RICHARD L. DUGGER,

Petitioner,

- v -

CHARLES KENNETH FOSTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

This brief is submitted by respondent Foster in opposition to the petition for writ of certiorari filed by the State of Florida through petitioner Richard L. Dugger.

COUNTER-STATEMENT OF THE CASE

Petitioner has grossly misrepresented and distorted the claim upon which Mr. Foster prevailed in the Florida Supreme Court, the record facts material to that claim, and the Florida Supreme Court's opinion. These matters will be addressed in the next section of Mr. Foster's brief.

REASONS FOR DENYING CERTIORARI

In his attempt to present a question worthy of the Court's review, petitioner has resorted to sheer fantasy. He has distorted beyond recognition the claim presented by Mr. Foster, the record facts material to that claim, and the Florida Supreme Court's analysis of the claim. When these matters are considered in light of the actual record of the Florida Supreme Court proceeding, it is manifest that Mr. Foster's case presents no question worthy of review.

Mr. Foster's claim before the Florida Supreme Court was a straightforward claim under Hitchcock v. Dugger, __U.S.__, 95 L.Ed.2d 347 (1987). He argued that the penalty phase instructions precluded the jury from considering evidence of nonstatutory mitigating circumstances and that the trial judge failed to consider that same evidence in the course of determining his sentence. See generally, Petition for Writ of Habeas Corpus (Supreme Court of Florida), attached hereto as Appendix A. He pointed to the evidence before the jury and judge which established three nonstatutory mitigating circumstances: his long history of mental illness and the failure of mental health institutions to provide appropriate treatment, Appendix A at 12; his intoxication at the time of the murder, id.; and his remorse for the commission of the murder. Id.

Notwithstanding Mr. Foster's unambiguous pleading of this claim, petitioner has argued that the claim complains of the jury's and judge's failure to consider nonstatutory mitigating circumstances which were not offered into evidence. Petitioner provides no citation to the trial record or to the Florida Supreme Court's opinion to support this characterization, because there is no support for it. Mr. Foster's claim focused exclusively upon the nonstatutory mitigating circumstances supported by the evidence admitted at trial. See Appendix A, at 12 (citing the trial transcript to show the record basis for the nonstatutory mitigating circumstances). His claim in no respect

relied upon, or even referred to, mitigating circumstances which had not been presented in the evidence admitted at trial. Petitioner's characterization of the claim otherwise is a direct misrepresentation.[1]

To bolster this misrepresentation, petitioner distorts the trial record as well. He argues that Mr. Foster personally prevented the preparation and presentation of the mitigating evidence which he (Mr. Foster) now claims was not considered. This argument rests upon two false premises: first, that evidence of nonstatutory mitigating circumstances was not before the jury and judge, and second, that Mr. Foster must bear responsibility for the omission that evidence. We have already shown that the first premise is belied by the trial record, for the record reveals that there was evidence presented at trial which could have led the jury or judge to find three nonstatutory mitigating circumstances.

The inaccuracy of the second premise is most concisely demonstrated by the findings of the Eleventh Circuit in its most recent decision on Mr. Foster's ineffective assistance of counsel claim. These findings reveal that despite Mr. Foster's disagreement with counsel over the pursuit of a mental illness defense, counsel pursued it anyway:

> The trial began on October 1, 1975. Foster's case rested entirely on his own testimony. Foster was planning to suggest that one of

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[1]In other proceedings independent of the original habeas corpus proceeding in the Florida Supreme Court that is the subject of the instant certiorari petition, Mr. Foster has complained of his trial lawyer's ineffective assistance in failing to present the evidence that was most material to the mental illness mitigating circumstance. See Appendix to Petition for Writ of Certiorari herein, at A-17 et seq. In those proceedings, however, Mr. Foster has never argued that defense counsel presented no evidence of mental illness. Rather, he has argued that defense counsel has failed to present the best, most material evidence of mental illness -- which would have established statutory mitigating circumstances had it been presented. In so arguing, Mr. Foster has always acknowledged that his trial counsel did present some evidence of mental illness which had mitigating value. It is this evidence, along with evidence of intoxication and remorse, that has always formed the basis for Mr. Foster's Lockett claim, which he litigated in his first state post-conviction and federal habeas corpus proceedings (1981-84) and which he relitigated in state habeas after Hitchcock was decided.

> the women committed the homicide. In the middle of this testimony, however, Foster broke down and made a dramatic witness stand confession consistent with his earlier confession to the police. Following this confession, the jury convicted Foster of murder in the first degree and robbery. The sentencing phase commenced immediately thereafter.
>
> During the penalty phase, Mayo pursued a strategy Foster had earlier rejected: to defend on the basis of Foster's mental and emotional state at the time of the crime. The mitigating evidence Mayo presented to the jury consisted of the testimony of two witnesses and documents pertaining to Foster's two involuntary commitment proceedings.

Petition for Writ of Certiorari herein, at A-19 and A-20 (footnotes omitted).

Accordingly, Mr. Foster cannot be held responsible for "waiving" the presentation of nonstatutory mitigating evidence. Contrary to petitioner's distortion, such evidence was presented, and it was presented despite Mr. Foster's once-expressed desire that it not be.

In a further variation on this "waiver" theme, petitioner argues that in any event, Mr. Foster asked to be sentenced to death. Whatever the implication might be if a capital did make such a request, those implications need not be considered here, for Mr. Foster made no such request. Petitioner has again distorted the trial record.

At no point in the trial did Mr. Foster ask to be sentenced to death. After the jury recommended that he be sentenced to death, Mr. Foster did reveal an uncommon willingness to bear responsibility for his actions. In response to the judge's giving him the opportunity to speak before sentence was pronounced, he said,

> I just want to, you know, some way to let the jury know that I don't, that I am not mad about them coming with a verdict to sentence me to death because from the evidence shown I didn't show that man no mercy, you know. I was drunk but, when it happened, but that, being drunk ain't no excuse.

T. 657. Mr. Foster reiterated these feelings at the very end of the trial:

> I would like to ask any of the family of Mr. Lanier present, I believe they are. I would like to, you know, tell them that I sure hated that it happened because I wouldn't have ever hurt that fellow if I had been sober but being drunk ain't no excuse.

T. 661-62.

These honest expressions of remorse and of acceptance of the consequences of his actions can in no way be equated with Mr. Foster's asking that he be sentenced to death. While these expressions reveal a potential for rehabilitation that is mitigating -- and indeed is a nonstatutory mitigating circumstance that the trial judge should have considered -- they cannot be taken as petitioner construes them: as an affirmative desire to be sentenced to death that would have negated or counterbalanced appropriate consideration of mitigating circumstances. No such desire was ever expressed by Mr. Foster in the course of his trial.

Finally, petitioner has fundamentally distorted the Florida Supreme Court's reasoning in granting relief to Mr. Foster under Hitchcock and Lockett. Petitioner has argued that the Florida Court granted relief mechanically, based upon a misperception of the requirements of Hitchcock, upon seeing the "talismanic" instructions condemned in Hitchcock. As with so many of petitioner's arguments, this argument also misrepresents what occurred in the court below. Far from granting relief mechanically upon seeing "talismanic" instructions, the Florida Supreme Court considered all of the indications in the record that the trial judge had restricted his own consideration of mitigating circumstances and, deciding that he had done so, determined that for this reason alone Mr. Foster should be resentenced:

> The fact that the judge, the ultimate sentencing authority, did not consider nonstatutory mitigating evidence settles the issue because there was some nonstatutory mitigating evidence that the Court could have considered.

Petition for Writ of Certiorari herein, at A-7.[2]

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[2]Petitioner's argument that the Florida Supreme Court mechanically applied Hitchcock extended to his belief that the Florida Supreme Court refused to consider whether the Lockett

Petitioner further argues that, despite the Florida Court's finding that "there was some nonstatutory mitigating evidence that the court could have considered," id., there really was no such evidence. Even if petitioner's contention were true, it is hard to imagine why a state supreme court's erroneous characterization of evidence as nonstatutory mitigating evidence is a question worthy of this Court's review. Nevertheless, the Florida Supreme Court's characterization of the evidence was not erroneous. It has previously recognized that while evidence of mental illness and intoxication may fall short of establishing any statutory mitigating circumstances, the evidence may nevertheless establish nonstatutory mitigating circumstances. See, e.g., Huddleston v. State, 475 So.2d 204 (Fla. 1985) (troubled personal life, including suicidal impulses, depression and deep frustration, are valid nonstatutory mitigating factors); Amazon v. State, 487 So.2d 8 (Fla. 1986) (personality disturbance is valid nonstatutory mitigating factor); Moody v. State, 418 So.2d 989 (Fla. 1982) (same). Indeed, the court has expressly recognized that where mental disturbance is not so extreme or disabling as to establish the statutory mental mitigating circumstances, it should nevertheless be considered as a nonstatutory mitigating circumstance. See Johnson v. State, 438 So.2d 774, 779 (Fla. 1985). Further, it has recognized that expression of remorse may establish a potential for rehabilitation, which is a nonstatutory mitigating circumstance. See Simmons v. State, 419 So.2d 316 (Fla. 1982); Magill v. State, 386 So.2d 1188 (Fla. 1980).[3] Accordingly, the Florida Supreme Court's acknowledgment that "there was some nonstatutory mitigating evidence that the

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error was harmless. The record refutes this argument as well, for the court acknowledged that "Hitchcock left open the possibility of harmless error," but noted that this was "an issue the state did not brief in this case." Petition for Writ of Certiorari herein, at A-8 n.3.

[3]Petitioner's argument that Mr. Foster's expression of remorse was never proffered as a mitigating circumstance is belied by the record, for as we have already noted, this evidence was evoked by the trial judge's giving Mr. Foster the opportunity "to say why the judgment of the Court and sentence of the law should not now be pronounced upon you[.]" T.656.

court could have considered" was nothing more than a faithful application of settled state law to the facts of Mr. Foster's case.

When petitioner's distortions of this case are removed, it is thus abundantly clear that the case presents no question worthy of review. The Florida Supreme Court applied Hitchcock and Lockett thoughtfully and faithfully, without expanding the rule of either case, to a set of facts squarely controlled by Hitchcock. No more and no less should be expected of the state courts in our federal system.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF FLORIDA

CHARLES KENNETH FOSTER,	:	
	:	
Petitioner,	:	
	:	
vs.	:	
	:	CASE NO. _____
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,	:	
	:	
Respondent.	:	
	:	

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION AND STATEMENT OF JURISDICTION

1. This Court's original jurisdiction is invoked pursuant to Rule 9.030(a)(3), Fla.R.App.P. (1977). As allowed under Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986), Mr. Foster asks the Court to utilize its habeas corpus jurisdiction to re-examine its prior appellate judgment in his post-conviction proceedings.

2. In May, 1981, the Court affirmed the denial of Mr. Foster's Rule 3.850 motion. Foster v. State, 400 So.2d 1 (Fla. 1981). In that motion Mr. Foster claimed, inter alia, that during the course of his 1975 trial the judge had restricted the jury's and his own consideration of mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Foster did not object to the error at trial, nor present it on direct appeal. The Court held that the error was not a proper subject for a post-conviction motion since it could have and should have been raised on direct appeal. 400 So.2d at 4.

3. Since then, the Court has changed its view on this matter and has decided that this error can be a proper subject for a post-conviction motion even though it was not raised at trial or on direct appeal. In Copeland v. Wainwright, ___ So.2d ___, 12 F.L.W. 178 (April 9, 1987), the Court recognized, as it had in Harvard v. State, 486 So.2d 537 (Fla. 1986), that prior to its decision in Songer v. State, 365 So.2d 696 (Fla. 1978) and the United States Supreme Court's decision in Lockett v. Ohio, "the Florida death penalty sentencing law could . . . have been read to limit the consideration of mitigating factors to those circumstances listed in the statute." 12 F.L.W. at 179. In cases tried after Lockett and Songer, when "the Florida statute had clearly been construed to permit consideration of nonstatutory mitigating circumstances, consistent with the dictates of Lockett[,] . . . any confusion in the law had been resolved and clarified." Id. In these cases Lockett error plainly could have been raised at trial and on appeal, and thus,

in these cases, Lockett error could not be raised for the first time in a post-conviction motion. Id. However, Copeland teaches as well that in cases tried before Lockett -- at a time when there was "confusion in the law" -- errors which would later be deemed Lockett error reasonably might not have been raised at trial or on direct appeal. For this reason, the Court recognized that in these cases Lockett error could be raised for the first time in a Rule 3.850 motion. Accord Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987).[1]

4. Mr. Foster's case was tried in October, 1975.[2] Accordingly, under the teaching of Copeland and Aldridge, he was entitled to raise the Lockett error for the first time in his Rule 3.850 motion. His failure to have raised the error at trial or on appeal should not have been treated as a default. Nevertheless, when Mr. Foster raised the Lockett error in his Rule 3.850 motion, this Court held that the error was not cognizable because it could have and should have been raised on direct appeal.

5. The Court should entertain the instant petition in order to remedy this error in its appellate judgment. While the Court's original habeas jurisdiction is generally not "a vehicle for obtaining a second determination of matters previously decided on appeal," Messer v. State, 439 So.2d 875, 879 (Fla. 1983), in very narrow circumstances, it is a vehicle for reconsidering matters previously decided on appeal. "It is only

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[1]In Aldridge, where the trial occurred in 1975, the Court recognized that although Aldridge could not be faulted for not having raised the Lockett error at trial or on direct appeal--his appeal having been decided in 1977 -- he could be faulted for not having raised the Lockett error in his first Rule 3.850 motion, which was filed after Lockett was announced. "Aldridge had an opportunity to raise the issue after Lockett in prior [Rule 3.850] proceedings and has failed to do so." 503 So.2d at 1259.

[2]Although the Court announced its opinion on Mr. Foster's direct appeal several months after the Lockett decision and two months after the Sorger decision, the appeal had been briefed, argued, and submitted for decision well before the decision in Lockett. Thus, there was no meaningful opportunity to present the Lockett error on appeal. In addition, the error had not been raised at trial; even if there had been an opportunity to present the error on appeal, the lack of objection would have foreclosed review. Maxwell v. State, 490 So.2d 927, 934 (Fla. 1986).

in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter previously settled by the affirmance of a conviction or sentence." Kennedy v. Wainwright, 483 So.2d at 426. The error here -- barring, due to trial and appellate default, a post-conviction claim of Lockett error which this Court has since recognized should not be barred by default in a case tried before Lockett --unquestionably resulted in the denial of Mr. Foster's fundamental constitutional rights. The right to an individualized determination of sentence through a procedure in which all relevant mitigating evidence is given independent consideration is the most consistently enforced and zealously guarded of any Eighth Amendment right applicable to capital proceedings. As we show herein, Mr. Foster was sentenced to death in disregard of this right. The Court's error in 1981 in precluding review of the violation of this right should not now stand in the way of acknowledging Mr. Foster's legitimate constitutional claim.

STATEMENT OF THE CASE AND FACTS

Case Chronology

6. Mr. Foster was convicted of first degree murder and robbery on October 4, 1975. (RA-33,34)[3]. A jury recommended the death penalty for the murder charge. (RA-43). The Circuit Court of the Fourteenth Judicial Circuit sentenced Mr. Foster to death for the murder charge and to life imprisonment for the robbery count. (RA-44,45). This Court affirmed the conviction and sentence, Foster v. State, 369 So.2d 928 (Fla. 1979), and the United States Supreme Court denied certiorari. 444 U.S. 885 (1979).

7. On May 6, 1981, Mr. Foster filed a motion for post-

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[3] Mr. Foster will cite to record references by the following designations:
(T-): The transcript of his 1975 trial and sentencing.
(RA-): The record on direct appeal to this court from the imposition of the death penalty in 1975.
(R-): The record on appeal from the denial of his first motion for post-conviction relief in 1981.

convicton relief pursuant to Rule 3.850, Fla.R.Crim.P. (R-1-39). The Circuit Judge summarily denied the motion, (R-91), and Foster appealed. This Court affirmed the Circuit Court order. Foster v. State, 400 So.2d 1 (Fla. 1981).

8. Subsequently, Mr. Foster sought a writ of habeas corpus in federal court. The United States District Court for the Northern District of Florida denied the petition following an evidentiary hearing. Foster v. Strickland, 517 F.Supp. 597 (N.D. Fla. 1981). A panel of the United States Court of Appeals for the Eleventh Circuit affirmed denial of the writ. Foster v. Strickland, 707 F.2d 1352 (11th Cir. 1983), cert. denied 466 U.S. 993 (1984). A second petition was then denied by the district court on June 5, 1986. An appeal from that judgment is now pending before the Eleventh Circuit. Foster v. Wainwright (No. 86-3539).

9. A second motion for post-conviction relief raising the sole claim that the trial court's comments to the jury violated Caldwell v. Mississippi, 472 U.S. 320 (1985) was denied by the trial court on January 14, 1987. State v. Foster (No. 75-486). A notice of appeal from that denial was filed in this Court on March 4, 1987. Foster v. State (No. 70,184). The appeal is currently pending.

Material Facts

10. The facts of the murder and robbery for which Petitioner was convicted are contained in the first motion for post-conviction relief (R-2-8). The following facts relate to the statutory constraints on the trial judge and jury's consideration of mitigating evidence.

11. As the sentencing trial commenced, the court explained to the jury that: "At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider." (T-597-8) (Emphasis added). Prior to their sentencing deliberations, he instructed the jurors that "[the] mitigating circumstances which you may consider if established by the

evidence are these," followed by a list of the statutory mitigating circumstances. (T-648-49).[4] He then instructed them to "consider all the evidence tending to establish one or more mitigating circumstance and give that evidence such weight as you feel it should receive in reaching your conclusions as to the sentence which should be imposed." (T-650). After the death sentence was imposed, the trial judge issued the following findings:

> The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in subsection (5) of section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravating circumstances.

(Supp. Record on Direct Appeal, Case No. 48380) (Emphasis supplied).

12. Throughout the course of Mr. Foster's trial, the permissible scope of consideration of mitigating circumstances was articulated in similar terms. Through the comments and arguments of counsel and the additional instructions of the court, the rule communicated to the jury and applied by the judge was that only the mitigating circumstances specified by the Florida Statute could be considered.

13. During voir dire, the defense attorney questioned six jurors in the panel whether they could follow the judge's

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[4] A. That the Defendant has no significant history or (sic) prior criminal activities.
B. That the crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
C. That the victim was a participant in Defendant's conduct or consented to the act.
D. That the Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor.
E. That the Defendant acted under extreme duress or under the substantial domination of another person.
F. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
G. The age of the Defendant at the time of the crime.

(T-648-9). Fla. Stat. Ann. 921.141(6) (1985).

instructions and consider the statutory mitigating circumstances in determining sentence:

> MR. MAYO: You believe you sit there, equally that you would consider the instructions of the court and if [mental or emotional disturbance] was one of the things you could consider you would give that equal weight in a recommendation to the Court?

(T-136) (Emphasis added). All six jurors agreed they could apply the statutory mitigating circumstances as instructed by the judge. (T-136). Later during voir dire the prosecutor echoed that requirement to a new panel of prospective jurors. To qualify as jurors, he explained that they must follow the judge's instructions and weigh the enumerated statutory mitigating circumstances against the aggravating circumstances to determine sentence:

> MR. SYFRETT: Mr. Mayo is correct when he states that if you return a murder in the first degree the trial will go into a second stage for the purposes of you making a recommendation to the Court of life imprisonment or death. Those are the two options available. The Court will instruct you as to the mitigating and aggravating circumstances that you are to consider in that phase of the trial.

(T-141) (Emphasis added).

14. During closing arguments at the sentencing phase, counsel for the state reiterated the jury's limited role in applying only statutory mitigating circumstances in recommending sentence, by advising them that the "statute which sets up this procedure has set up certain things that they, that the statute says are mitigating; certain things they say are aggravating." (T-630). He cast the proffered mitigation as an attempt to prove only one statutory mitigating circumstance, and equated that attempt with the state's burden of proving an aggravating circumstance:

> There are three aggravating circumstances which the State contends are present in this case. Now then these aggravating circumstances that the State contends exist in this case, the three that we contend; we contend there are no mitigating circumstances. There has been some attempt on the part of the defense to introduce the fact that Mr. Foster is sick. Nobody questions that.

(T-630).

15. Defense counsel's closing argument at sentencing also

referred, explicitly and inferentially, to the court's instructions which would limit mitigation to statutory circumstances. (T-635-6,640). He urged the jury to consider the statutory circumstances of mental or emotional disturbance and the defendant's capacity to appreciate the criminality of his conduct (T-640-1). He did not refer to any other considerations relevant to mitigation, or attempt to broaden the jury's conception of mitigation beyond the statutory definition.

ARGUMENT

16. This Court has recently reversed death sentences where the judge and jury were limited in their consideration of mitigating evidence as they were in Mr. Foster's case. Lucas v. State, 490 So.2d 943, 946 (Fla. 1986); Harvard v. State, 486 So.2d 537 (Fla. 1986), cert. denied, 479 U.S. ___ (1986). These cases represent the culmination of an evolutionary process in which this Court has moved from holding that instructions and findings like those in Mr. Foster's case comported with Lockett to holding that they do not. Compare Peek v. State, 395 So.2d 492, 496-97 (Fla. 1981); Songer v. State, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 956, 51 S.Ct. 2185 (1979), with Lucas v. State, supra. In Peek, for example, the Court held that instructions directing the jury's attention only to statutory mitigating circumstances did not preclude the jury's consideration of nonstatutory mitigating circumstances. 395 So.2d at 496. In Lucas, however, the Court recognized that where the court "instructed the jurors only on the statutory mitigating circumstances," and defense counsel's argument reinforced the view that only such circumstances could be considered, the jury may well have been limited in its consideration of mitigating circumstances. 490 So.2d at 946 (Emphasis in original). Between the decisions in Peek and Lucas, the Court began to recognize that in directing the sentencer to consider a delimited list of mitigating circumstances, "the

Florida death penalty sentencing law [and instructions pursuant to it] could previously [before the decision in Lockett] have been read to limit the consideration to those circumstances listed in the statute." Copeland v. Wainwright, 12 F.L.W. at 179. With this recognition, the evolution from Peek to Lucas could -- and did -- take place.[5]

17. The correctness of this evolution has recently been confirmed and its conclusion mandated by the United States Supreme Court in Hitchcock v. Dugger, 55 U.S.L.W. 4567 (April 21, 1987). Hitchcock held that instructions to the jury, indistinguishable from instructions given in Mr. Foster's case, unconstitutionally limited the jury's consideration of mitigating circumstances. Further, Hitchcock held that the judge's sentencing order stating that he considered only the statutorily enumerated mitigating circumstances in imposing sentence reflected an unconstitutional limitation of his own consideration of mitigating evidence. Thus, Hitchcock, along with Lucas and Harvard, controls the disposition of Mr. Foster's case.[6]

18. Both the judge and the jury in Mr. Foster's case were constrained in their assessment of mitigating evidence. Instructions given by the court and counsels' arguments interlocked to constrain the jury. The judge's understanding of the law, as reflected by the jury instructions and his written

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[5]Indeed, it is this same evolution that has resulted in the change in the Court's procedural default rule concerning Lockett error in cases decided before Lockett. So long as the Court maintained that the Florida Statute comported in all respects with Lockett, the Court could justifiably expect claims of Lockett error to have been raised at trial or on appeal. With the recognition that prior to Lockett the statute could have been read to limit the consideration of mitigating circumstances, the Court has properly held that defendants tried before Lockett cannot be faulted for failing to raise Lockett-based claims at trial or on appeal. Thus, the Court's recent determinations that Lockett error can properly be raised for the first time in a Rule 3.850 motion by defendants sentenced prior to Lockett is a reflection of the evolution of the Court's Lockett-related jurisprudence.

[6] Lockett's Eighth Amendment prohibition on excluding mitigating evidence is clearly retroactive. Truesdale v. Aiken, 55 U.S.L.W. 3642 (March 23, 1987) (Lockett retroactively applies to error in excluding prison guard's testimony). Thus, Hitchcock's application of Lockett to the Florida sentencing procedure is retroactive. Accord Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc).

findings, constrained him as well.

19. In Lucas v State the trial court had "instructed the jury only on the statutory mitigating circumstances," which impermissibly curtailed consideration of mitigating evidence and required a new sentencing proceeding. 490 So.2d 946. The trial court in Mr. Foster's case also instructed the jury exlusively on statutory mitigating circumstances. (T-650, ¶11, supra). These instructions are functionally identical to those disapproved in Hitchcock. The Hitchcock court instructed the jury that "'[the] mitigating circumstances which you may consider shall be the following . . .' (listing the statutory mitigating circumstances)." Hitchcock, 55 U.S.L.W. at 4569. Mr. Foster's trial judge instructed the jury that "[the] mitigating circumstances which you may consider if established by the evidence are these," followed by the statutory list. (T-648-9). Both instructions define and therefore limit what mitigating circumstances the jury "may" consider. Prior to these instructions, the trial court had already advised Mr. Foster's jury (before the sentencing phase began) that evidence of certain matters in mitigation would be presented, and that he would instruct them later as to "the factors in ... mitigation that you may consider." (T-597-8; ¶11, supra). Since an "examination of the sentencing proceedings in this case" establishes that "the sentencing judge assumed ... a prohibition [against considering nonstatutory mitigation] and instructed the jury accordingly," the jury's consideration of mitigating evidence was constrained in violation of the Eighth Amendment. Hitchcock, 55 U.S.L.W. at 4568.

20. Even more, the jury's belief that it could consider only the specified mitigating circumstances was bolstered by the arguments of counsel, as in Lucas and Harvard. In voir dire the jury's ability to apply statutory mitigating circumstances (and inferentially only statutory circumstances) was made a virtual condition of service, prematurely delineating their reception of evidence in anticipation of their sentencing role. (T-131-195;

¶13, supra). Further, both defense counsel and the attorney for the state argued to the jury at the close of the sentencing trial that the trial court's instructions would limit their consideration of mitigating evidence to statutory circumstances. (T-630,635-6,640-1; ¶¶ 14-15, supra).

21. Similar to Hitchcock, Lucas, and Harvard, the limitation communicated to the jury in Mr. Foster's case was also clearly applied by the judge in the actual determination of Mr. Foster's sentence. The instructions themselves demonstrate "that the sentencing judge assumed ... a prohibition" against the consideration of nonstatutory mitigating circumstances. Hitchcock, 55 U.S.L.W. at 4568. See Lucas v. State, supra; see also Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985) ("An erroneous instruction may ... provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors"). Moreover, the judge's sentencing findings revealed that he considered only statutory mitigating circumstances in deciding to sentence Mr. Foster to death. As in Hitchcock, "[the judge] described the process by which he reached the sentencing as follows," 55 U.S.L.W. at 4569:

> The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in subsection (5) of section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravating circumstances.

(Supp. RA, Case No. 48380)(Emphasis supplied). There could be no more explicit statement that the judge considered only statutory mitigating circumstances in making his sentencing decision. As this Court has held, "[A]n appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute." Harvard v. State, 486 So.2d at 539.

22. For these reasons, as in Hitchcock, "it could not be

clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances," in violation of the requirements of the 8th Amendment. 55 U.S.L.W. at 4569.

23. In spite of trial counsel's reasonable belief that the jury was precluded from considering nonstatutory mitigating evidence (T-136,635-6,640; ¶¶13,15, supra), significant evidence of nonstatutory mitigation was available, either to the jury or to the judge, before Mr. Foster's sentencing order was entered.[7] This evidence included the following:

(a) The continuous and frustrated attempts of Mr. Foster and his family to obtain treatment for the mental health problems which contributed to his violent behavior (T-625-6);

(b) Mr. Foster's deep sense of guilt and willingness to take full blame for the crime, manifest in his voluntary statements to the Court that "I was drunk but ... being drunk ain't no excuse" (T-657), his apology to the victim's family (T-661-662), his confession on the witness stand (T-463-84, 510-511), and the fact that he voluntarily turned himself in and confessed to the police (T-475);

(c) The lessening of meaningful deliberation and intent to commit murder caused by Mr. Foster's mental problems combined with the effects of alcohol (T-617-18);

(d) Mr. Foster's inability to reflect upon the consequences of his actions, caused by his mental problems combined with the effects of alcohol, (T-617-18).

24. Any possible combination of these factors could have influenced the jury and judge's assessment of Mr. Foster's moral

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[7] As this Court has recognized, nonstatutory mitigating circumstances are often present in evidence admitted for other purposes, and except for the constraints upon counsel, jury and judge, could have been proffered and considered in mitigation in the sentencing proceeding. Harvard, 486 So.2d at 539 ("nonstatutory mitigating factors may arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceeding").

culpability, rendering their constrained sentence unreliable. The evidence regarding Mr. Foster's mental problems and the influence of alcohol on the crime would have been significant even if the jury found it insufficient to establish the statutory "mental mitigating" circumstances. For example, the jury could rationally have concluded that proof of "extreme mental or emotional disturbance" required evidence along a medical model which trial counsel failed adequately to provide. Yet such evidence, singularly or in the aggregate, could well have influenced a properly instructed jury in making a "reasoned moral response to the defendant's background, character, and crime," California v. Brown, 479 U.S. ___, 93 L.Ed.2d 934, 942 (1987) (O'Connor, J., concurring) (emphasis in original), resulting in a sentence less than death. Mr. Foster's sincere apology to the victim's family and his persistent willingness to accept moral responsibility for the crime could as well have distinguished him from those deserving of death, yet the court and jury were restrained from weighing that distinction, as well as others, in sentencing.

25. In these circumstances, the Court cannot "confidently conclude that [the jury's and judge's consideration of nonstatutory mitigating evidence] would have had no effect upon the jury's [and judge's] deliberations." Skipper v. South Carolina, 90 L.Ed.2d 1, 9 (1986). See also Hitchcock v. Dugger, 55 U.S.L.W. at 4569 (allowing the state to show that Lockett error was harmless, in "that it had no effect on the jury or the sentencing judge"). Mr. Foster's case is not one in which the only reasonable sentence would have been death. While two statutory aggravating circumstances were present, substantial nonstatutory mitigating circumstances were also present. On just such a record, this Court has emphasized, "We cannot know ... [whether] ... the result of the weighing process by both the jury and the judge would have been different" in the absence of factors unconstitutionally skewing the jury's sentencing deliberations. Elledge v. State, 346 So.2d 998, 1003 (Fla.

1977). This is so because

> 'the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present....'

Id. (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)). Accordingly, this Court "cannot say" that the limitation upon the jury's and judge's consideration of mitigating circumstances had "no effect" on the sentencing recommended and imposed.

CONCLUSION

26. For these reasons, the Court should reconsider Petitioner's appeal from the denial of his first post-conviction relief motion, reverse the denial and remand for a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by mail to Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, this 26th day of May, 1987.

Richard H. Bunn III

ATTORNEY FOR PETITIONER

Supreme Court, U.S.
FILED
JUN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1701

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

RICHARD L. DUGGER,

Petitioner,

v.

CHARLES KENNETH FOSTER,

Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

Petitioner will rely upon original statement.

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner, Richard L. Dugger, submits for the Court's consideration this reply to certain arguments and statements of facts raised in the Respondent's Brief in Opposition.

OPINIONS BELOW

The Petitioner's original statement is relied upon.

JURISDICTION

The Petitioner's original statement is relied upon.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner's original statement is relied upon.

STATEMENT OF THE CASE

The Petitioner's statement is correct and fully supported by the record. The unprofessional **ad hominem** attacks of Mr. Foster's counsel are unworthy of these proceedings.

REASONS FOR GRANTING THE WRIT

Mr. Foster contends that his petition for habeas corpus relief was a "straightforward **Hitchcock** claim". This is not quite the truth.

Foster presented a claim of error pursuant to **Hitchcock v. Dugger,** 481 U.S. _____, 95 L.Ed.2d 347 (1987), which cited "evidence" which was never presented to the trial court and which was "evidence" that defense counsel (Mr. Mayo) was accused of "failing to produce" in two prior federal §2254 petitions. See **Strickland v. Foster,** 707 F.2d 1339 (11th Cir. 1983), **amended,** 707 F.2d 1352, **cert. denied,** 466 U.S. 993 (1983); **Foster v. Dugger,** 823 F.2d 402 (11th Cir. 1987). Defense counsel was specifically accused of not developing or presenting hospital records and other evidence relating to an alleged "P.T.S.D." illness suffered by Foster. When

certiorari is granted and this Honorable Court can see the actual trial transcripts, Foster's malicious and incorrect statements will become obvious.

Foster, again, sinking beneath professional practice, also attacks counsel for the State by contending that Foster did not prevent counsel from investigating or preparing nonstatutory mitigating evidence. For several years, Foster's lawyers have maintained this position notwithstanding the truth and the express factual determinations of the District and Federal Circuit Courts. We stand by those federal, judicial determinations that Foster **obstructed** counsel and **prevented** the **presentation** of this mitigating evidence. Perhaps over-zealous counsel for Mr. Foster also thinks the Eleventh Circuit "grossly misrepresents" facts.

The Florida Supreme Court is bound by state statute (Sec. 924.33, Fla.Stat.), to conduct "harmless error" review whether or not harmless error has been raised by the parties. This requirement is greater than that of Fed.R.Crim.P. 52(a), because it places an affirmative duty upon the Court to review the "harmless error" issue in every case. When, as here, the Florida Supreme Court shirks its duty simply because the parties did not "brief"[1] it, then the State's detrimental reliance upon

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[1] Although zealously attacking counsel for the State, Foster neglects to mention that the issue was not "briefed" because the Court did not permit briefing. Foster petitioned for "habeas corpus", an original civil action to which the State responded with a superceding motion to dismiss, citing procedural defenses. When the Florida Supreme Court denied the State's motion, it should have allowed us to file an answer and supporting brief. It did not do so.

the statute becomes a violation of the state's right to due process of law.

The sordid history of Foster's collateral attacks, misquoted medical reports, churlish **ad hominem** attacks upon counsel and successive, abusive pleadings has culminated in an unwarranted grant of habeas corpus relief by the new Florida Supreme Court. Relief came, however, at the expense of the decisional law of this Court (and the rights of the people of Florida), through a bizarre overextension of **Hitchcock, supra,** to include evidence which was never presented to a sentencer "but could have been presented".

The vicious nature of Foster's response reveals the fact that we have touched a raw nerve - a nerve exposed because of Foster's reliance upon non-record "evidence" in support of a so-called **Hitchcock** claim.

We are not dealing with "mere error" by

the Florida Supreme Court. We are dealing with a total "perversion of justice", **Curry v. Wilson,** 405 F.2d 110 (9th Cir. 1968), in which **Hitchcock** is being used to permit capital defendants to return to court, decades after trial, and put on "mitigating evidence" which they **elected not to put on** at trial. Only this Court's intervention can afford relief to the public.

CONCLUSION

It is suggested that certiorari should be granted.

Respectfully submitted,

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